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No. _____

In The

Supreme Court of the United States

October Term, 1997

ELMO HUMPHREY, III,

Petitioner,

versus

BURL CAIN, WARDEN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Where an oral jury charge includes three definitions of reasonable doubt previously approved in context by this Court, and additionally includes the phrase "doubt for which you can give good reason," does the court commit reversible error in applying the outdated Cage language to the jury charge and holding that the jury "could" have misunderstood the phrase to mean that the jurors were required to articulate doubt and therefore, lower the state's burden of proof?

(2) Is the holding in *Cage* retroactive to collateral review cases final before *Cage* was decided?

INTERESTED PARTIES

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David J. Schenck, counsel of record for respondent

Burl Cain, Warden, Louisiana State Penitentiary

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PRELIMINARY STATEMENT

This case presents a reasonable doubt jury charge[1] that includes phrases previously held in context of the

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[1] The pertinent language in the *State v. Humphrey* instruction is as follows:

> The defendant is presumed to be innocent until each element of the crime necessary to constitute his guilt is proven beyond a reasonable doubt. The defendant is not required to prove that he is innocent. Thus, the defendant begins the trial with a clean slate.
>
> (1) The burden is upon the State to prove the defendant's guilt beyond a reasonable doubt. (2) In considering the evidence, you must give the defendant the benefit of every reasonable doubt arising out of the evidence or out of the lack of evidence. (3) If you are not convinced of the guilt of the defendant beyond a reasonable doubt, you must find him not guilty.
>
> Reasonable Doubt
>
> (4) If you entertain any reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your sworn duty to give him the benefit of that doubt and return a verdict of acquittal. (5) Even where the evidence demonstrates a probability of guilt, yet if it does not establish it beyond a reasonable doubt, you must acquit the accused. (6) This doubt must be a reasonable one, that is, one found upon a real, tangible, substantial basis, and not upon mere caprice, fancy or conjecture. (7) It must be such a doubt it would give rise to a grave uncertainty, raised in your minds by reason of the unsatisfactory character of the evidence; one that would make you feel that you had not a moral certain [sic] of the defendant's guilt. (8) If, after giving a fair and impartial consideration to all of the facts in the case you find the evidence unsatisfactory upon any single point indispensably necessary to constitute the

entire jury instruction to be constitutionally valid by this Court along with the phrase "doubt for which you could give good reason." The issue is whether the charge is unconstitutional when viewed in its entirety.[2] The State of Louisiana now seeks Supreme Court review of the United States Fifth Circuit's en banc decision that held the jury instruction given in this 1989 conviction is unconstitutional. The State argues that: (1) the Fifth Circuit incorrectly applied the *Victor v. Nebraska*[3] "reasonable likelihood" standard and that the charge taken as a whole

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> defendant's guilt, this would give rise to such a reasonable doubt as would justify you in rendering a verdict of not guilty.
>
> (9) The prosecution must establish guilt by legal and sufficient evidence beyond a reasonable doubt, but the rule does not go further and require a preponderance of testimony. (10) It is incumbent upon the State to prove the offense charged, or legally included in the indictment, to your satisfaction and beyond a reasonable doubt. (11) A reasonable doubt is not a mere possible doubt. (12) It should be an actual or substantial doubt. (13) It is such a doubt as a reasonable man would seriously entertain. (14) It is a serious doubt for which you could give good reason.

State v. Humphrey, Div. C., Twenty Fourth Judicial District, State of Louisiana (1989) (No. 88-223), Tr. Record at 962-64. (Sentence numbers taken from the dissenting opinion.)

[2] The entire jury charge is attached as Appendix E.

[3] In *Victor v. Nebraska*, 511 U.S. 1, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994), the Court upheld jury instructions in two state capital cases under a modified standard: Was there a reasonable likelihood that the jury applied the instruction in an unconstitutional manner?

was constitutional, and (2) *Cage* is not retroactive to habeas cases final before *Cage v. Louisiana*[4] was decided.

COURSE OF PROCEEDINGS BELOW

Elmo Humphrey was convicted by jury of the aggravated rape of a child under the age of twelve. Humphrey's conviction and sentence were repeatedly affirmed by Louisiana courts on direct and post-conviction review. His petition for habeas relief raised issues of a defective reasonable doubt instruction and the timeliness of prosecution.

The United States District Court, Eastern District of Louisiana, denied federal habeas relief. The court ruled that *Cage v. Louisiana* is not applied retroactively to habeas cases final before *Cage* because *Cage* did not fashion a new rule under the Supreme Court's retroactivity analysis in *Teague v. Lane*.[5] Following Fifth Circuit precedents applying *Teague*, the court ruled that *Cage* fashioned a new rule and did not meet either of the two exceptions. The district court reiterated the Supreme Court's instructions that in analyzing the "issue of reasonable doubt since *Cage*, . . . the proper inquiry is not whether the

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[4] *Cage v. Louisiana*, 498 U.S. 39, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990) (per curiam).

[5] *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989). These exceptions are a new rule that (1) places a class of private conduct beyond the power of the State to proscribe or (2) is a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding. 489 U.S. at 311, 109 S. Ct. 1076.

instruction 'could have' been applied in an unconstitutional manner, but whether there is a reasonable likelihood that the jury did so apply it."[6] The court affirmed the conviction on the grounds that prosecution was timely, that the instruction was not a prohibited *Cage* instruction, and that *Cage* was not retroactive on collateral review.[7]

On appeal of the denial of his federal habeas petition, a three judge panel of the Fifth Circuit Court of Appeal denied relief based on mandatory Fifth Circuit precedents that hold that the *Cage v. Louisiana* and *Victor v. Nebraska*[8] standards do not apply to habeas cases. However, the panel urged reversal of its precedents that hold *Cage* and *Victor* are not retroactive, and further, signaled their belief that the jury charge violated *Cage* and *Victor* and lowered the State's burden of proof. *Humphrey v. Cain*, 120 F.3d 526 (5th Cir. 1997).[9]

The Fifth Circuit sitting en banc, in a one paragraph opinion, adopted the panel's analysis. The court reversed the panel's denial of habeas relief, overruled conflicting

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[6] *Humphrey v. Cain*, (No. 95-0936) (E.D. La. Oct. 13, 1995) (citing *Estelle v. McGuire*, 502 U.S. 62, 112 S. Ct. 475, 482, 116 L. Ed. 2d 385 (1991); *Victor v. Nebraska*, 511 U.S. 1, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994)) (District Court order adopting the magistrate's Report and Recommendation of July 31, 1995).

[7] The magistrate's Report and Recommendation is attached as Appendix C; the district court's order adopting the report and recommendations is attached as Appendix D.

[8] *See supra* note 3 and accompanying text.

[9] The panel's decision is attached as Appendix B.

precedents,[10] and remanded the case to the district court with instructions for the State to either retry Humphrey or to release him within ninety (90) days of the district court's order. *Humphrey v. Cain*, 138 F.3d 552 (5th Cir. 1998). Four judges dissented from the court's holding on the grounds that, taken as a whole, the charge conveyed the correct definition of reasonable doubt.

STATEMENT OF JURISDICTION

The jurisdiction of this Court to review the ruling of the United States Fifth Circuit is invoked by 28 U.S.C. § 1254(1) and further by Rule 10 of this Court. The Fifth Circuit Court of Appeal granted the writ of habeas corpus under 28 U.S.C. § 2254 on April 3, 1998. From this ruling the State of Louisiana seeks review.

STATEMENT OF FACTS

After a five day trial, a Jefferson Parish jury convicted Humphrey of child rape. The testimony at trial revealed that Humphrey was entrusted with the care of the victim. He often babysat J.M. when she was between nine and eleven years old. The victim, sixteen years old at

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[10] *Johanson v. Whitley*, 36 F.3d 89 (5th Cir. 1994) (unpublished decision); *Brown v. Cain*, 104 F.3d 744, 753 (5th Cir. 1997), *cert. denied*, ___ U.S. ___, 117 S. Ct. 1489, 137 L. Ed. 2d 699 (1997); *Skelton v. Whitley*, 950 F.2d 1037 (5th Cir. 1992), *cert. denied sub nom. Skelton v. Smith*, 506 U.S. 833, 113 S. Ct. 102, 121 L. Ed. 2d (1992); *Smith v. Stalder*, 26 F.3d 1118 (5th Cir. 1994) (unpublished decision).

the time of trial, testified that after Humphrey kissed her, he began to "feel my body. He'd stick his finger inside of me and see how far he could go." The victim testified that if "he would make it further and further it was an achievement for me." This digital penetration continued about two weeks. During a weekend when Humphrey was babysitting, he instructed the victim to get Vaseline which he then put on his penis and on the victim's vagina. Then Humphrey "got on top of me and stuck his penis inside of my vagina."

During the trial, Humphrey repeatedly pursued personal attacks on the character of the victim. The jury, who heard and saw the victim testify, believed the victim despite these attacks. The jurors alone had the power and duty to determine if they believed the victim, and they convicted Humphrey of rape.[11]

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[11] On direct appeal, the Louisiana Fifth Circuit Court of Appeal noted the facts of the abuse as follows:

> Elmo Humphrey was employed by Kathy Calhoun to babysit with her daughter J.M. from early 1980 to March 1982 when the family moved from Metairie to New Orleans. J.M. was born October 20, 1971, making her nine years old when Humphrey began molesting her. The sexual activity continued for two years, until J.M. was eleven and Humphrey in his late twenties. In 1987, when she was sixteen years old, J.M. told her mother about the sexual abuse, resulting in Humphrey's indictment for violation of La. R.S. 14: 42(A)(4).

State v. Humphrey, 544 So. 2d 1188 (La.App. 5 Cir. 1989).

In light of the fact that insufficiency of the evidence has never been argued as a basis for habeas relief, the Fifth Circuit's

REASONS FOR GRANTING THE WRIT

This case deserves this Court's review on several grounds. First, the Fifth Circuit's one paragraph en banc decision is at odds with the reasoning and holdings by three other circuits that have reviewed jury charges containing similar language. These other circuits found that charges with the language "doubt for which you could give good reason" or "doubt for which you could give a reason" pass constitutional scrutiny in the context of the entire charge.

Second, this is an issue of first impression. The Supreme Court has not reviewed an instruction alleged to be violative of *Cage* under the modified standard of *Victor v. Nebraska*.

Next, the Fifth Circuit applied an incorrect standard of review. In its reasoning, the court, in effect, used the *Cage* standard rather than its modification by *Victor*.

Finally, this case directly questions whether *Cage* announced a new rule and whether it is retroactive on collateral review. The Fifth Circuit held that the charge in this case contained the same flaw as the instruction in *Cage*, and applied *Cage* retroactively to vacate the conviction.

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extensive and hostile account of the facts reconstructed in the panel opinion is troubling. *Humphrey v. Cain*, 120 F.3d at 533-34. Only the jury who heard the evidence firsthand had the authority to determine the guilt of the accused. Judicial review should be limited to strictly legal issues. The federal appellate court should not redetermine Humphrey's guilt or innocence based on its factual interpretation or its conceptualization or attitude regarding the victim.

1. SPLIT IN THE CIRCUITS

In the instant case, the Fifth Circuit singled out four phrases for criticism: "grave uncertainty," "moral certainty," "doubt for which you could give good reason," and "actual and substantial doubt." The specific language that the Fifth Circuit found most troubling was the third phrase, "doubt for which you could give good reason." The Fifth Circuit's holding is inconsistent with three other circuit holdings decided after this Court's decision in *Cage v. Louisiana*. The District of Columbia, First, and Second Circuits have found that charges with the language "doubt for which you could give good reason" and "doubt for which you could give a reason" pass constitutional scrutiny in the context of the entire charge. The charge in the instant case has substantial similarities to the charges other courts have reviewed, although there are differences in the exact wording of the charges.

In *Cage v. Louisiana*, the Court found the definition of reasonable doubt constitutionally defective because the jury "could" have applied the instruction in an unconstitutional manner.[12] The charge was defective because a combination of the phrases "grave uncertainty," "actual and substantial doubt," and "moral certainty," absent rehabilitative language, lowered the state's burden of proof.[13]

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[12] In *Cage v. Louisiana*, 498 U.S. 39, 41, 111 S. Ct. 328, 329, 112 L. Ed. 2d 339 (1990) (per curiam).

[13] *Cage v. Louisiana*, 498 U.S. at 40, 111 S. Ct. at 329.

In *Victor v. Nebraska*, the Court upheld jury instructions in two state capital cases under an emerging standard that modified the *Cage* standard: was there a "reasonable likelihood" that the jury applied the instruction in an unconstitutional manner?[14] The charge in the first case reviewed, Sandoval, contained the phrases "not a mere possible doubt," "depending on moral evidence," and "to a moral certainty."[15] The charge given in the second case, Victor, contained the phrases "to a moral certainty," "strong probabilities of the case," and "actual and substantial doubt."[16] In both cases the Supreme Court upheld the charges because of sufficient saving language that did not result in diminishing the States' burden of proof.

In the instant case, the Fifth Circuit panel's reasoning for reversal is based on the "doubt for which you could give good reason" language. The panel's sole support for its position is *Dunn v. Perrin*, 570 F.2d 21, 23 (1st Cir. 1978). In that case the jury was instructed to support their doubt with "good and sufficient reason." The court in *Dunn* declined to reverse on this ground but rather reversed because there was a "distinct possibility" that the jury was misled by cumulative errors in the entire charge.

Here, Judge Jones' dissent distinguishes the instant case from *Dunn* which required a good and sufficient

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[14] *Victor v. Nebraska*, 511 U.S. 1, 22, 114 S. Ct. 1239, 1251, 127 L. Ed. 2d 583 (1994). (Emphasis added).

[15] *Victor v. Nebraska*, 511 U.S. at 7, 114 S. Ct. at 1244.

[16] *Victor v. Nebraska*, 511 U.S. at 18, 114 S. Ct. at 1249.

reason. She properly observed that the "good and sufficient" language "ratchets the defense's burden upward" and is actually stronger than the charge given in *Humphrey*. This Court, as the dissent notes, has accepted as constitutionally valid the other disputed portions of the charge when the charge is viewed in its entirety. The language so offensive to the Fifth Circuit "doubt for which you could give good reason" has been held constitutionally acceptable by the First, Second, and District of Columbia circuits applying the *Victor v. Nebraska* standard rather than the "could" have language of *Cage v. Louisiana*.

In *United States v. Dale*, 991 F.2d 819, 852-53 (D.C. Cir. 1993), the instruction was taken from the judicial Red Book for criminal jury instructions for the District of Columbia. The jury was charged that reasonable doubt is:

> a doubt for which you can give a reason. It is such a doubt as would cause a juror, after careful and candid and impartial consideration of all the evidence, to be so undecided that he cannot say that he has an abiding conviction of the defendants guilt.[17]

Id. at 853. Despite a challenge that this instruction required articulation of doubt, the court distinguished *Cage* and upheld this instruction as constitutionally acceptable under the "reasonable likelihood" standard because the instruction in its entirety fairly conveyed

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[17] The panel in the instant case attempts to distinguish between "a" reason and a "good" reason. Judge Jones' dissent correctly notes that this is a distinction without a difference. *Humphrey v. Cain*, 138 F.3d at 558.

"that the requisite doubt must be 'based on reason' as distinguished from fancy, whim, or conjecture." *Id.*

More recently, in *Vargas v. Keane*, 86 F.3d 1273, 1277 (2d Cir. 1996), the Second Circuit upheld a charge that was a variation on New York's jury instructions containing the language "It is a doubt for which you can give a reason if called upon to do so by a fellow juror in the jury room." The court recognized that the language was less than exemplary. Nevertheless, applying the "reasonable likelihood" standard of *Victor*, the court found the charge constitutional despite a defense argument that the instruction required articulation of doubt.

In *Chalmers v. Mitchell*, 73 F.3d 1262 (2nd Cir. 1996), the defendant argued that instructing the jury that a "reasonable doubt is one for which some good reason can be given," shifted the burden of proof to the defense. Acknowledging that the "good reason" language *might* mislead a jury into looking to the defense to provide reasons for the doubt, the court concluded "that in the context of the whole instruction in this case, it is not reasonably likely that the jurors misunderstood the proper burden of proof" because the trial court made it clear that the burden of proof never shifts to the defendant and that the defendant was not required to prove his innocence. *Id.* at 1268.

The second argument raised by Chalmers was that the instruction that "a reasonable doubt is one for which some good reason can be given" raised the level of doubt needed for acquittal from a "reasonable reason" to a "good reason." The court noted that the use of "good" to

modify "reasonable" "was intended, and likely understood, to mean that the proper foundation of a reasonable doubt was in fact rather than fantasy." *Id.* In discussing the similar use of "good" to qualify "reason" in *Victor's* instruction, the court noted that *Victor*

> held that "substantial" did not raise the quantum of doubt requiring acquittal because it was clear from the context that "substantial" would have been taken by the jury to mean the opposite of doubt based on "fanciful conjecture," and not taken to mean that a substantial *amount* of doubt was required.

Id. at 1269 (citation omitted). After this analysis, the court determined that it was not reasonably likely that the level of doubt necessary for acquittal was increased or the burden of proof shifted and upheld the conviction. *Id.* at 1270.

In a recent Second Circuit case, *Beverly v. Walker*, the court upheld a constitutional challenge to an instruction with the language:

> Reasonable doubt must be based entirely and absolutely upon *some good sound substantial reason*. . . . A juror who has a reasonable doubt and asserts it ought to first be able to give that reasonable doubt a reason for it to himself, and *he should be able to communicate that to his fellow jurors* that reasonable doubt in the event they ask him to do so. . . . This degree of proof cannot be had in human affairs. . . . It is possible, however, to establish the guilt of defendant to a *reasonable degree of certainty*.

Beverly v. Walker, 118 F.3d 900, 901 (2nd Cir. 1997) (emphasis added). The court analyzed the charge in its

entirety, noting the *Victor* standard is whether it is "reasonably likely" that the jury applied the wrong standard. *Id.* at 902-3.

Regarding the "good sound substantial" language, the Second Circuit found

> [i]t is not reasonably likely that the jury understood these words to describe the quantity of doubt necessary for acquittal, rather than as a contrast to doubt based on impermissible criteria, such as conjecture or speculation.

Id. at 904. In response to the defendant's argument that the language "to a reasonable degree of certainty" lowered the burden of proof, the court found that the misleading language did not make the entire charge constitutionally deficient. That phrase

> when read in the context of the surrounding language, was used to illuminate the correct point that the prosecution was not required to prove the defendant's guilt 'beyond all possible or imaginary doubt or to a mathamatical [sic] certainty.'

Id.

In *Gilday v. Callahan*, 59 F.3d 257, 264-65 (1st Cir. 1995), the court considered a jury charge which spanned twenty paragraphs when reduced to writing. Six paragraphs contained the reasonable doubt charge. The jury was told that proof beyond a reasonable doubt is proof to a "moral certainty," that it is not a mathematical certainty, and further:

> When you get all through analyzing this evidence, it has to be a doubt nagging your mind,

> leaving you with an uncertainty of conviction to that moral certainty which you can stand up and argue in the jury room with principle and integrity and honesty to your fellow jurors.

Id. at 262. The First Circuit noted that the language "moral certainty" in isolation may be reversible error and that the questioned language was not ideal and *could possibly* have led a juror astray. *Id.* at 266 (emphasis added). Nevertheless, "the lengthy charge offered additional formulations emphasizing the high level of proof necessary for conviction." *Id.* at 263. Recognizing that the standard is not "could have" but is *Victor's* whether "there is a reasonable likelihood that the jury understood the instruction as a whole to permit conviction based on a level of proof below that required by the Due Process Clause," the court found the charge was not reasonably likely to lower the burden of proof. *Id.* at 266-67.

The Fifth Circuit is the only circuit to so strongly condemn the language "doubt for which you could give good reason." No other circuit since this Court decided *Cage* has held that the sole presence of "doubt for which you could give good reason" constitutes constitutional error and is not rehabilitated by other saving language. No other circuit since this Court decided *Victor* has looked back to a 1978 case, such as *Dunn v. Perrin* (a non-binding case in this circuit), to find language and reasoning to censure a reasonable doubt instruction.

2. THE SUPREME COURT HAS NOT REVIEWED AN INSTRUCTION ALLEGED TO BE VIOLATIVE OF *CAGE* UNDER THE MODIFIED STANDARD OF *VICTOR V. NEBRASKA*.

This Court has not yet reviewed a charge similar to *Cage's* reasonable doubt charge after announcing the "reasonable likelihood" standard of *Victor*[18] or *Boyde*.[19] In fact, the Court has expressly declined to review a charge identical to *Cage* under the *Victor* standard for procedural reasons.[20] Further, in *Sullivan v. Louisiana*, where the charge was identical to that of *Cage*, this Court declined to scrutinize the charge under the "reasonable likelihood" standard because the State failed to argue in the lower courts that the *Victor* standard applied.[21] *Sullivan v. Louisiana*, 508 U.S. 275, 278 n*, 113 S. Ct. 2078, 2081 n*, 124 L. Ed. 2d 182, 188 n1 (1993).

Cage is the only case where this Court has found a reasonable doubt instruction constitutionally defective. Since that time, this Court has modified the standard of

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[18] *Victor v. Nebraska*, 511 U.S. at 5, 114 S. Ct. at 1243.

[19] *Boyde v. California*, 494 U.S. 370, 380, 110 S. Ct. 1190, 1197, 108 L. Ed. 2d 316, 329 (1990).

[20] In *Gaskins v. McKellar*, 500 U.S. 961, 111 S. Ct. 2277, 114 L. Ed. 2d 728 (1991), the Court denied certiorari in a case questioning whether *Cage* announced a new rule. Justice Stevens observed in his opinion that the question of a new rule would only be presented if the charge in that case contained the same flaw as the instruction in *Cage*.

[21] Instead, using harmless error analysis, the Court found the charge taken as a whole correctly conveyed the correct standard of reasonable doubt. Unlike *Sullivan*, Louisiana has preserved this issue for review.

review. *Cage* was decided under a former standard of review no longer in effect: that the charge *could have* lowered the State's burden.

Certiorari should be granted in this case, which is significantly different from the *Cage* and *Sullivan* charges, to review the charge under the *Victor* reasonably likelihood standard. The State has argued from the time the issue was raised, that the charge, taken as a whole, was not reasonably likely to lower the prosecution's burden of proof. A review under *Victor* by this Court would bring stability and uniformity to the jurisprudence. This is especially important where future habeas cases will be affected by the Fifth Circuit's ruling.

In Mississippi, Louisiana, and Texas courts, the Fifth Circuit's ruling is not controlling precedent. These state supreme courts may consider the Fifth Circuit's opinion as persuasive authority. On the other hand, if the state courts decline to follow the Fifth Circuit's reasoning and holding, a prisoner may unsuccessfully challenge his state court conviction in state court and obtain federal habeas relief because the federal courts in the Fifth Circuit will be bound by *Humphrey v. Cain*.[22] These reversals will result in retrials or dismissals, an unconscionable cost to the state and its citizens.

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[22] Although the State does not have an accurate estimate of the number of prisoners that could challenge their conviction based on *Humphrey v. Cain*, the State is aware of one other case that is pending in the Eastern District of Louisiana with this issue and this charge: *Wilson v. Cain*, (No. 97-1551) (E.D. La. 1997).

Further, prisoners in other circuits may seek reversal of their convictions based upon the Fifth Circuit's erroneous analysis. These other state and federal courts must choose to distinguish *Humphrey* or attempt to follow the erroneous analysis of the Fifth Circuit. The Fifth Circuit's opinion is so broad that its application in a particular situation is an open question providing little to no guidance. Concievably, under the Fifth Circuit's retroactive application of *Cage* as a new rule and its expansive interpretation, any reasonable doubt jury instruction will be open to challenge on collateral review. Review under the *Victor* standard is imperative.

3. THE FIFTH CIRCUIT APPLIED AN INCORRECT STANDARD OF REVIEW

The Fifth Circuit applied the wrong standard in reviewing the charge. Although the panel's decision correctly cites the *Victor* standard,[23] the reasoning and language reveals the use of a highly subjective prejudicial standard, not *Victor's* objective test, in reaching the conclusion that the jury "could" have used a higher burden of proof than constitutionally required.

The court's reasoning, with subjective and subjunctive case language highlighted, is as follows:

> A reasonable doubt instruction is not a technical nicety; for a jury, it is a basic proposition of its constitution. Undecided jurors *may analyze* their own doubts time after time in light of the instruction before settling on a decision. By the

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[23] *Victor v. Nebraska*, 511 U.S. at 5, 114 S. Ct. at 1243.

> same token, jurors who have already made up their minds *may recite* the instruction time after time in order to bring undecided jury members over to their side. Insisting that a juror be able to articulate a reason is a troublesome step upon residual doubt. But our focus today is upon an instruction that went further. A juror favoring guilt *would have* a powerful tool *if he could demand* that undecided jurors articulate good reasons for considering an acquittal. Such a juror *could use* Humphrey's reasonable-doubt instruction to argue that it's not enough to have a reason to acquit – that one must have an especially strong, compelling, or persuasive reason for doubting the defendant's guilt. He *could plausibly assert* that a paucity of government evidence should not count as a "good" reason. Under this sort of pressure, inarticulate and undecided jurors are *less likely* to give defendants the benefit of their doubts. Requiring articulation of good reasons, then, skews the deliberation process in favor of the state by *suggesting* that those with doubts must perform certain actions in the jury room – actions that *many* individuals find difficult or intimidating before they *may vote* to acquit.

Humphrey, 120 F.3d at 531 (emphasis added). The panel's discussion is couched exclusively in subjective terms. The subjective "could" have test of *Cage* had been replaced with the more objective "reasonable likelihood" test as articulated in *Victor*. The Fifth Circuit ignored the *Victor* analysis.

Another fact disregarded by the Fifth Circuit is that Louisiana juries are not permitted to have written jury instructions during deliberations. La.C.Cr.P. art. 793. It

would be impossible for the jurors to dismember the reasonable doubt instruction as contemplated in the Fifth Circuit's analysis. Here, the jury heard the instruction orally, one time. The reasonable doubt instruction covered two legal pages of a fourteen page jury charge. In the instant jury charge the panel singled out four phrases, "grave uncertainty," "moral certainty," "doubt for which you could give good reason," and "actual and substantial doubt," and dissected them to find the charge as a whole constitutionally defective.

Since *Cage* was decided, courts throughout the country have reviewed jury charges under an increasing level of scrutiny. The reviewing court's task, however, is to determine if the instruction was constitutional, not whether it was exemplary.[24] In hindsight, the Fifth Circuit in 1997 and 1998 found deficiencies in the instruction given in Humphrey's 1989 trial. It was error to conclude that these deficiencies "could" have, and actually did, violate the constitution.

The dissent correctly notes the error of the majority. Sentences numbered (1) through (6) starting with the phrase "the burden is upon the state to prove the defendant's guilt beyond a reasonable doubt" and ending with "[t]his doubt must be a reasonable one . . . and not upon mere caprice, fancy, or conjecture" properly articulate the reasonable doubt standard and provides context for the rest of the instruction. Sentences (8) through (10) clarify that the burden of proof rests with the State for each

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[24] *Vargas v. Keane*, 86 F.3d 1273, 1280 (2d Cir. 1996).

element of the offense charged and that reasonable doubt must be based upon the evidence.

Sentences numbered (1) through (10), read in context with the entire charge, mitigate against any potential error caused by "grave uncertainty," "moral certainty," "doubt for which you could give good reason," and "actual and substantial doubt" in sentences (7), (12), and (14). Sentence (7), taken in context, compares doubt based on the existence or non-existence of evidence with doubt based on conjecture or fancy. Sentences (2) - (5) and (8) - (10) mitigate the "grave uncertainty" language by making clear that the defendant is given the benefit of every reasonable doubt arising from the evidence. The redeeming language of sentence (8) was not present in the *Cage* instruction.

The *Humphrey* instruction relates the term "moral certainty" to the evidence in the case. As in *Victor*, the jury is admonished to rule solely on the evidence and not to be swayed by speculation, conjecture, passion, or prejudice. Further, the terms "abiding conviction" in this case, were confirmed in *Victor* as showing a subjective state of near certitude and therefore, in context, mitigate any potential misunderstanding.

The third condemned phrase "actual or substantial doubt" refers to the existence of actual evidence and is cured by being distinguished from conjecture.

Finally, the phrase "doubt for which you could give good reason" is, taken in context, merely a restatement that reasonable doubt is not based on mere speculation or possibility. A good reason refers to doubt arising from the evidence. The instruction emphasizes that a reasonable

doubt is the type of doubt required for an acquittal and that probabilities are not sufficient to convict. As referenced earlier, the majority erroneously cites only one case, *Dunn v. Perrin*. The *Humphrey* instruction does not *necessitate* or *require* that a juror *must* give a "good reason," as the panel suggests. The instruction equates reasonable doubt with "a serious doubt for which you *could* give good reason." It merely expresses a shade of doubt, i.e., it *could* be so.

In sum, nowhere does the instruction state a requirement of articulation of doubt. Eleven out of fourteen sentences on reasonable doubt are entirely correct and unobjectionable. Those that were questionable are saved by companion language.

4. *CAGE* SHOULD NOT BE APPLIED RETROACTIVELY IN A COLLATERAL PROCEEDING

a. Retroactivity of *Cage/Sullivan* on collateral review is an issue of first impression for the Court

Humphrey's conviction was final when *Cage v. Louisiana* was decided. Only after Humphrey's conviction became final was a charge containing the language "it must be such doubt as would give rise to a grave uncertainty," "it is an actual substantial doubt," and "moral certainty" determined to be constitutionally defective.

If this Court finds a reasonable doubt charge violates *Cage* or *Victor*, the question of *Cage* retroactivity on collateral review should be resolved. To date, this Court has not ruled that *Cage* and *Victor* should be applied retroactively to cases on collateral review. There is a firm rule

against retroactivity in habeas cases of any rule of law handed down after the petitioner's conviction was final. *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989). Habeas relief is unwarranted if the claim relies on a new rule announced after the petitioner's conviction was final. *Id.*

In applying *Teague*, habeas courts must determine the date the state defendant's conviction became final, survey the legal landscape as it exists at the time of the conviction to determine if the claim was then compelled by existing precedent, and consider if one of the two narrow exceptions to retroactivity exists. *Teague*, 489 U.S. at 310, 109 S. Ct. at 1075; *Lambrix v. Singletary*, ___ U.S. ___, 117 S. Ct. 1517, 1524, 137 L. Ed. 2d 771 (1997). These exceptions are a new rule that (1) places a class of private conduct beyond the power of the State to proscribe or (2) is a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding. *Teague*, 489 U.S. at 311, 109 S. Ct. 1076. The *Teague* court announced that it was unlikely that many components basic to due process were yet to emerge. *Id.* at 313, 109 S. Ct. at 1077. The issue here is whether *Cage* announced a watershed rule of criminal procedure.

Sullivan v. Louisiana, 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993), a direct appeal as was *Cage* itself, is not on point because it does not address collateral attacks on convictions or *Teague* retroactivity. *Sullivan* held only that a constitutionally defective reasonable doubt instruction cannot be harmless error in the context of a direct appeal. A further distinction is that *Sullivan* was decided under the "could" have standard of *Cage*, prior to *Victor*,

and expressly declined to use the "reasonable likelihood" standard of *Boyde* and its progeny.[25]

In sum, this Court has not previously addressed directly the retroactivity of *Cage*. If the Court decides *Cage* is retroactive on collateral review, the Court must apply a *Victor* or *Boyde* standard because the Court has modified *Cage*.

b. Retroactive application of *Cage* and *Victor* to collateral review cases would be unduly burdensome and against the public interest

The State has an interest in the finality of convictions. The purpose of *Teague* is to ensure that gradual developments in the law over which reasonable jurists may disagree are not later used to upset the finality of state convictions valid when entered. *Sawyer v. Smith*, 497 U.S. 227, 234, 110 S. Ct. 2822, 2827, 111 L. Ed. 2d 193, 206 (1990).

Uncorrected, the decision of the Fifth Circuit will have serious results. In the Fifth Circuit, it will result in a finding of incurable error in all cases with the same or substantially similar charges. It will force federal courts

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[25] In *Boyde v. California*, 494 U.S. 370, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (1990), decided nine months before *Cage*, this Court applied a "reasonable likelihood" standard in reviewing a jury charge. In *Cage*, the Court considered how reasonable jurors "could" have understood the charge as a whole. *Cage*, 498 U.S. at 41, 111 S. Ct. 329, 112 L. Ed. 2d at 342. In *Estelle v. McGuire*, 502 U.S. 71, 72 n.4, 112 S. Ct. 475, 482 n.4, 116 L. Ed. 2d 385, 394 n.4 (1991), the Court expressly disapproved the standard in *Cage* and approved the standard given in *Boyde*.

in Louisiana, as well as Texas and Mississippi, to vacate convictions long since final. *United States v. Dale*, *Vargas v. Keane*, *Beverly v. Walker*, *Chalmers v. Mitchell*, and *Gilday v. Callahan* demonstrate the diversity of charges and the differing judicial interpretations. Retroactive application of *Cage* in the Fifth Circuit will create a litigation explosion, making the Fifth Circuit's anomalous decision even more conspicuous and difficult for this Court to ignore unless other circuits adopt the Fifth Circuit's holding.

Regardless of a circuit's reasoning in analyzing a reasonable doubt instruction, retroactive application of *Cage* touches all reasonable doubt instructions in this country. If *Cage* applies retroactively, it will create indefiniteness concerning the constitutionality of all reasonable doubt instructions with language substantially identical or similar to "doubt for which you could give good reason." The resulting confusion will produce different charges, different analyses, and different results.

The uncertainty of the finality of all reasonable doubt cases decided before *Cage* or affected by the Fifth Circuit's ruling is an immense burden on judicial resources. Contrary to the Fifth Circuit's belief, the floodgates to litigation will be opened. If *Sullivan* makes *Cage/Victor* retroactive, state post-conviction petitioners will surely challenge their own jury charges as Humphrey has. Federal relief will also be sought under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") because the Act does not prohibit federal habeas relief. 28 U.S.C. § 2254(e)(2)(A)(i). Future petitioners may obtain habeas relief under the theory that their conviction violates "a new rule of constitutional law, made retroactive to cases on collateral review that was previously unavailable" to

them.[26] *Id.* Because of the passage of time, the states may not be able to retry these habeas petitioners.

Finally, applying *Cage/Victor* retroactively after a conviction is final is unfair to the states and their citizens. It creates a substantial risk that a state cannot retry defendants despite the fact that the alleged error is not the fault of the state and the conviction was constitutionally valid when final. States will have to re-defend convictions in post-conviction proceedings that have long been deemed final. Because of the passage of time in many cases, a retrial will not be possible and defendants convicted under a jury charge that was legal when given will be released from custody with no further accountability for their actions. If re-trial is possible, victims will bear the difficult emotional burden of reliving events long since laid to rest. Simply put, the cost is too high for actions that only later were adjudged to be constitutionally defective.

CONCLUSION

The jury charge in this case was not reasonably likely to alter the State's burden of proof. Three of the phrases the majority found troubling have been found constitutionally valid by this Court. The fourth phrase, "doubt for which you could give good reason," has been accepted by

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[26] Another argument in support of federal relief is that the decision is contrary to or involved an unreasonable application of a clearly established federal right. 28 U.S.C. § 2254(d)(1).

other circuit courts and does not alter the State's burden when viewed in context of the entire charge.

The Fifth Circuit Court of Appeal erred in finding that the charge was a prohibited *Cage* instruction. Unless reversed by this Court, *Humphrey v. Cain* will result in the courts of this circuit striking down convictions with charges similar to Humphrey's. At the same time, courts in the First, Second, or District of Columbia circuits will be compelled to uphold these charges and courts in other circuits will be free to decide without the benefit of controlling case law on the issue. This writ should be granted to bring uniformity to this area and to correct the Fifth Circuit's interpretation and application of *Cage* and *Victor* to reasonable doubt instructions.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-31101

ELMO HUMPHREY, III,

Petitioner-Appellant,

v.

BURL CAIN, Warden,
Louisiana State Penitentiary,

Respondent-Appellee.

Appeal from the United States District Court
For the Eastern District of Louisiana

(Filed Apr. 3, 1998)

Before POLITZ, Chief Judge, and KING, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, DUHÉ, WIENER, BARKSDALE, EMILIO M. GARZA, DeMOSS, BENAVIDES, STEWART, PARKER and DENNIS, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

We took this case en banc to resolve conflicting panel decisions whether *Cage-Victor* error fits within the second *Teague* exception, making it available in federal habeas to a state prisoner whose criminal conviction was final when those cases were decided. For the reasons stated in the panel opinion, we today give an affirmative answer to that question. We overrule all prior decisions of this court

holding to the contrary. For the reasons stated in the panel opinion,[1] we hold that the jury instructions defining reasonable doubt lowered the State's burden of proof below the constitutional minimum. We reverse the district court's judgment denying the writ of habeas corpus and remand the case to the district court with instructions to order the State of Louisiana to either try Elmo Humphrey, III, again or release him from custody within 90 days of the date of the district court's order on remand.

REVERSED and REMANDED with instructions.

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[1] *Humphrey v. Cain*, 120 F.3d 326 (1997). AEDPA is not applicable to this case.

EDITH H. JONES, Circuit Judge, with whom JOLLY, DUHÉ and PARKER, Circuit Judges, join in dissenting:

My colleagues have constitutionally condemned what is surely one of the longest reasonable doubt instructions in recent reported history based on four catch phrases, even though three of those phrases have, in proper context, survived Supreme Court scrutiny. What provoked the majority to ignore the rich forest of the whole instruction for the sake of a few sickly trees is not clear. But their analytical method ignores that we must scrutinize the instructions taken as a whole, not in isolated tidbits. And their emphasis on the court's statement that reasonable doubt "is a serious doubt for which you could give good reason" is misguided. [I] do not believe Humphrey's jury convicted him of repeated sexual molestation of a then-nine-year old victim on a constitutionally infirm standard. I respectfully dissent.[1]

On habeas review, "our inquiry is whether the instruction is constitutional, not whether it is exemplary." *Vargas v. Keane*, 86 F.3d 1273, 1280 (2d Cir. 1996). The test of constitutionality is whether taken as a whole, the instruction correctly conveyed the law of reasonable doubt to the jury. *See Victor v. Nebraska*, 511 U.S. 1, 5, 114 S.Ct. 1239, 1243 (1994). Further, a court must determine not whether the instruction *could* have been applied unconstitutionally, but "whether there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the

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[1] I concur in the court's decision that the *Cage/Victor* standard must be retroactively applied and in the ex post facto discussion.

Winship standard." *Id.* at 6, 114 S.Ct. at 1243. As the Supreme Court itself pointed out, it has found in only one case that a reasonable doubt definition actually violated the due process clause. *Id.* at 5, 114 S.Ct. at 1243. (citing *Cage v. Louisiana*, 498 U.S. 39, 111 S.Ct. 328 (1990)). We do not minimize the importance of furnishing a correct jury instruction on reasonable doubt, but neither will we trivialize the importance of carefully reviewing jury instructions as a whole before declaring that the jury was reasonably likely to have interpreted them unconstitutionally.

Two general vices may render a reasonable doubt instruction unconstitutional: that it urges the jury to convict on a standard of proof lower than "beyond a reasonable doubt," or that it permits the jury to go outside the record evidence to convict. *See id.* at 5-6, 22, 114 S.Ct. at 1243, 1251. Mindful of these pitfalls, we may review the *Humphrey* reasonable doubt instruction, with each sentence numbered for the convenience of this discussion. The *Humphrey* jury was instructed:

> (1) The burden is upon the State to prove the defendant's guilt beyond a reasonable doubt. (2) In considering the evidence, you must give the defendant the benefit of every reasonable doubt arising out of the evidence or out of the lack of evidence. (3) If you are not convinced of the guilt of the defendant beyond a reasonable doubt, you must find him not guilty.
>
> (4) If you entertain any reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your sworn duty to give him the benefit of that doubt and return a verdict of acquittal. (5) Even where the evidence

demonstrates a probability of guilt, yet if it does not establish it beyond a reasonable doubt, you must acquit the accused. (6) This doubt must be a reasonable one, that is, one found[ed] upon a real, tangible, substantial basis, and not upon mere caprice, fancy or conjecture. (7) It must be such a doubt [as] would give rise to a grave uncertainty, raised in your minds by reason of the unsatisfactory character of the evidence; one that would make you feel that you had not an abiding conviction to a moral certain[ty] of the defendant's guilt. (8) If, after giving a fair and impartial consideration to all of the facts in the case[,] you find the evidence unsatisfactory upon any single point indispensably necessary to constitute the defendant's guilt, this would give rise to such a reasonable doubt as would justify you in rendering a verdict of not guilty.

(9) The prosecution must establish guilt by legal and sufficient evidence beyond a reasonable doubt, but the rule does not go further and require a preponderance of testimony. (10) It is incumbent upon the State to prove the offense charged, or legally included in the indictment, to your satisfaction and beyond a reasonable doubt. (11) A reasonable doubt is not a mere possible doubt. (12) It should be an actual or substantial doubt. (13) It is such a doubt as a reasonable man would seriously entertain. (14) It is a serious doubt for which you could give good reason.

The first six sentences pose no constitutional problems. They properly articulate the reasonable doubt standard, and they provide context for the rest of the instruction. Sentences (8)-(10) provide further context and background for every challenged sentence in the instruction.

They make clear that the burden of proof rests with the state for each element of the offense charged and that a reasonable doubt must be based upon the evidence. Along with sentences (1)-(6), they mitigate any potential error caused by the challenged language.

Sentence (7) contains the first phrases to which the appellant objects: "grave uncertainty" and "moral certainty." The Supreme Court has held that use of the term "grave uncertainty," while not condoned, presents no constitutional infirmity if it relates to the existence rather than the magnitude of the evidence required. *See id.* at 20, 114 S.Ct. at 1250. Sentence (7), especially when taken in the context of the preceding two sentences, is rooted in making a comparison between doubts based on the existence (or nonexistence) of evidence versus doubts based on conjecture or fancy. In addition, the Court has held that even if the use of "grave uncertainty" touches upon the magnitude of the evidence, this error can be corrected if the instruction contains alternative, mitigating definitions of reasonable doubt. *See id.* In this case, sentences (2)-(5) and (8)-(10) serve to make clear that the defendant is to be given the benefit of every reasonable doubt arising from the evidence. Sentence (8) unequivocally requires a not-guilty verdict based upon a reasonable doubt if the evidence is "unsatisfactory upon any single point indispensably necessary" to convict. This sentence makes plain, as the *Cage* instruction did not, that reasonable doubt arises from any material deficiency in proof by the state.

The Court has also held that use of the term "moral certainty" is not constitutionally improper as long the rest of the instruction gives context to its meaning. *See id.*

at 14-16, 21-22, 114 S.Ct. at 1247-48, 1250-51. The *Humphrey* instruction as a whole confirms that "moral certainty" is not a vacuous term, but relates to the evidence in the case. As in *Victor,* other sentences admonished the jury not to be swayed by passion or prejudice, to rule solely on the evidence, and not to indulge in speculation or conjecture. *See id.* at 16, 114 S.Ct. at 1248. The jury was also required to have an "abiding conviction" of guilt to a moral certainty. In *Victor,* the Court viewed this phrase as confirming a "subjective state of near certitude" of the defendant's guilt. *Id.* at 15, 114 S.Ct. at 1247 (internal citation omitted). Thus, any possible misunderstanding of "moral certainty" was fully offset by its context. It is highly unlikely that the jury either misunderstood the burden of proof or strayed beyond the record because of this phrase.

Sentence (12) contains the third phrase condemned by the majority, "actual or substantial doubt." As with "grave uncertainty," the use of the phrase "actual or substantial doubt" is, in the context of the full instruction, tied to the existence rather than the magnitude of the evidence. This is particularly evident from the earlier reference to a "substantial basis" for reasonable doubt in sentence (6), which is juxtaposed to a doubt founded in "caprice, fancy or conjecture." The Supreme Court expressly held in *Victor* that any ambiguity about a "substantial doubt" was cured by its being distinguished from a mere possibility, caprice, or conjecture. *See id.* at 20, 114 S.Ct. 1250.

If these three phrases were the only ones involved in this case, the instruction would be upheld under *Victor.* It would be upheld because the phrases are properly

explained by their surrounding passages to enforce the state's high burden of proof beyond a reasonable doubt and to tie conviction only to the evidence or lack of evidence in the record. According to the majority, however, these phrases somehow lose the benefit of their mitigating context and are irretrievably misleading because they are conjoined with the last sentence in the instruction: "It is a serious doubt for which you could give good reason."

The majority's conclusion embodies three criticisms: of the term "good reason," of the "articulation-demanding" quality of the instruction, and of the alleged synergy with the other three undesirable phrases. On analysis, these criticisms, while aesthetically accurate, are constitutionally suspect.

First, the use of the phrase "good reason" in sentence (14) only repeats what the entire instruction has already conveyed to the jury. A reasonable doubt is not one based upon speculation or mere possibility. A "good reason" refers to the actuality of doubt arising from the evidence. Like other courts, *see, e.g., Beverly v. Walker,* 118 F.3d 900, 903 (2d Cir. 1997); *Chalmers v. Mitchell,* 73 F.3d 1262, 1268 (2d Cir. 1996), we do not condone the use of this phrase, but to say that it renders the instruction unconstitutional is to read the tea leaves more closely than is reasonably possible. The instruction as a whole emphasizes that a "reasonable doubt" is the type of doubt required for acquittal, that the benefit of every doubt is to be given to the defendant, and that probability of guilt is not sufficient to convict.

The majority is able to cite only one case in which a sister circuit has held that a reasonable doubt instruction containing the phrase "good reason" is unconstitutional. *See Dunn v. Perrin*, 570 F.2d 21 (1st Cir. 1978).[2] The specific offending language in *Dunn* was as follows: "It is such a doubt as for the existence of which a reasonable person can give or suggest a *good and sufficient reason.*" *Id.* at 23 n.1 (emphasis added). To require "good *and sufficient* reason" clearly ratchets the defense's burden upward. Moreover, the court expressly stated that while this language may have been improper, it was not by itself reversible error. *See id.* at 23. Rather, the court found that only the cumulative effect of this language plus numerous other impermissible phrases rendered the entire instruction unconstitutional. *See id.* at 25.[3]

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[2] Our research has disclosed one other, most unusual reasonable doubt instruction that a court of appeals held unconstitutional on habeas review. *Lanigan v. Maloney*, 853 F.2d 40 (1st Cir. 1988). The language in that charge is inapposite to this discussion.

[3] Specifically, the court found that it was two other parts of the instruction which were "clearly wrong." *Id.* at 22. These parts (i) equated reasonable doubt with a "strong and abiding conviction as still remains after careful consideration of all the facts and arguments," and (ii) permitted the jury to convict or acquit on the basis of "information which we do not positively know to be absolutely true and which we have no means of verifying." *Id.* at 24. Thus, "good reason" became unconstitutional only when combined with other highly damaging phrases. Such is not the case with the *Humphrey* instruction wherein "good reason" is combined with other phrases found constitutional by the Supreme Court when used in a proper context.

Second, the majority condemned the phrase "for which you could give good reason" as an "articulation-demanding" standard, and it complains:

> A juror favoring guilt would have a powerful tool if he could demand that undecided jurors articulate good reasons for considering an acquittal. Such a juror could use Humphrey's reasonable-doubt instruction to argue that it's not enough to have a reason to acquit – that one must have an especially strong, compelling, or persuasive reason for doubting the defendant's guilt. He could plausibly assert that a paucity of government evidence should not count as a "good" reason. Under this sort of pressure, inarticulate and undecided jurors are less likely to give defendants the benefit of their doubts. Requiring articulation of good reasons, then, skews the deliberation process in favor of the state by suggesting that those with doubts must perform certain actions in the jury room – actions that many individuals find difficult or intimidating – before they may vote to acquit.

Humphrey v. Cain, 120 F.3d 526, 531 (5th Cir. 1997).[4] This novel exercise in amateur psychology is not only highly speculative, it results in a *reductio ad absurdum* – any phrase plucked from a reasonable doubt instruction could be used to put a juror in the "uncomfortable" position of having to defend his vote of not guilty.

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[4] I note that the jury did not have the written jury instruction with them in the jury room. Rather, the instruction was read to them once by the judge before their deliberations began.

The flaw in the majority's analysis is illustrated by another – apparently unobjectionable – sentence from the *Humphrey* instruction: "This doubt must be a reasonable one, that is, one founded upon a real, tangible, substantial basis, and not upon mere caprice, fancy or conjecture." Why do these words not present the same danger as the words "good reason?" Does not a juror favoring guilt have a powerful tool if he can demand that undecided jurors articulate why their doubt is real, tangible, or substantial? Does not this phrase skew the deliberation process in favor of the state by suggesting that those with doubts must – or at least should – be able to explain why their doubts are not based upon mere caprice, fancy, or conjecture? Yet no one questions the propriety of including the sentence from which these questions arise in a constitutional reasonable doubt instruction.

Indeed, the *Humphrey* instruction does not *require*, as the majority suggests, that a juror give – or even be able to give – a "good reason." Rather, it merely equates reasonable doubt with "a serious doubt for which you *could* [not should or must] give good reason."

It should be significant that no other court has so strongly condemned the "doubt for which you could give a reason" instruction.[5] Judge Friendly seemed sympathetic to the observation that challenges to such an

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[5] *See, e.g., Gilday v. Callahan*, 59 F.3d 257, 264-65 (1st Cir. 1995) (holding constitutional a reasonable doubt instruction containing the sentence, "When you get all through analyzing this evidence, it has to be a doubt nagging your mind, leaving you with an uncertainty of conviction to that moral certainty which you can stand up and argue in the jury room with principle and integrity and honesty to your fellow jurors.");

instruction are "hypercritical," but he went on to agree that such an instruction is "not approved" and "perhaps unwise," yet it is "not erroneous." *United States v. Davis*, 328 F.2d 864, 867-68 (2d Cir. 1964). More recently, the Second Circuit upheld a reasonable doubt instruction that contained the sentence, "It is a doubt for which you can give a reason if called upon to do so by a fellow juror in the jury room." *Vargas*, 86 F.3d at 1275. The court explained its holding as follows:

> The premise of the petitioner's challenge . . . is that a juror may hold a reasonable doubt of a defendant's guilt, based on the evidence or lack of evidence offered by the prosecution, and yet be unable to articulate that doubt. Even if we assume that there exists a category of "reasonable" yet not "articulable" doubt, we do not see how the addition of the phrase "if called upon to do so by a fellow juror" alters the substance of the instruction sustained in cases such as *Davis* and *Leecan* in any constitutionally significant way. *The challenged language does not suggest – any more than the "for which a reason can be given" formulation standing alone – that a juror will be called upon to articulate his doubts, or that he must articulate them if so called upon.* Moreover, language surrounding the challenged language renders it unlikely that jurors would interpret the passage to require a higher degree of doubt

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United States v. Dale, 991 F.2d 819, 852-53 (D.C. Cir. 1993) (panel including Wald, Ruth Bader Ginsburg, JJ.) (holding constitutional a reasonable doubt instruction containing the sentence, "Reasonable doubt, as that name implies, is a doubt based on reason, it is a doubt for which you can give a reason.").

> than "reasonable" doubt for acquittal. The challenged language was immediately preceded and followed by language giving additional content to the phrase "reasonable doubt," emphasizing that the jurors' task was to engage in a careful, reasoned analysis of the evidence – or lack of evidence – presented. Accordingly, the jury was unlikely to have understood the challenged language to bear upon the degree or quantum of doubt necessary for acquittal, but rather, upon the appropriate basis for the formulation of a doubt sufficient for acquittal: as the charge properly stated, a "reasonable" doubt is not "just any kind of doubt, a mere whim or a guess or a feeling, or a surmise that the accused may not be guilty," but a doubt that "arises out of the credible evidence or the lack of credible evidence." Viewed in context, the challenged language simply does not suggest that a doubt formulated within one's own mind – reasonable, but not articulable – is insufficient for acquittal. Rather, it serves to emphasize, in conjunction with surrounding language, that any doubt sufficient for acquittal must be based on a reasoned evaluation of the evidence or lack of evidence, rather than on speculation, emotion, or whim.

Vargas, 86 F.3d at 1278 (emphasis added).

The *Humphrey* majority attempts to distinguish *Vargas*, in part, on the ground that it did not require jurors to articulate a "good" reason, as did the *Humphrey* instruction. *See Humphrey*, 120 F.3d at 532. Anyone reading the *Vargas* instruction cannot entertain the notion that because it calls for only "a reason" rather than a "good reason," it is constitutionally less suspect. The entire *Vargas* instruction reads as follows:

> A reasonable doubt is a doubt which you consciously have after the use of your powers of reasoning which arises out of the credible evidence or the lack of credible evidence.
>
> It is a doubt for which you can give a reason if called upon to do so by a fellow juror in the jury room. The standard of reason must be prevailing. When you are convinced that you have no doubt in reason of the defendant[']s guilt, that is when you will be justified in rendering a verdict accordingly. Consequently, after fairly and fully considering all of the evidence and the lack of evidence and using the same power of reasoning and power of thinking that would apply and do apply to weigh the importance of matters related to the [sic] important business affairs, if you then believe that each element of the crime submitted to you[ ] has been established beyond a reasonable doubt, you would be justified in finding the defendant guilty of that crime.

Vargas, 86 F.3d at 1275. A recent Second Circuit case upheld an even stronger articulation standard:

> A juror who has a reasonable doubt and asserts it ought to first be able to give that reasonable doubt a reason for it to himself, and he should be able to communicate that to his fellow jurors that reasonable doubt in the event they ask him to do so.

Beverly, 118 F.3d at 901. The court rejected the contention that this instruction shifted the burden of proof to the defendant, because the trial court repeatedly instructed the jury that the defendant was presumed innocent and

that the prosecution bore the burden of proof for conviction. *See id.* at 903; *see also Vargas*, 86 F.3d at 1278-79; *Chalmers*, 73 F.3d at 1267-68 (criticizing a charge that defined reasonable doubt as "a doubt for which some good reason can be given," but concluding that it was not reasonably likely that the jury misunderstood which party bore the burden of proof, since the court made it clear that the defendant remained innocent until the prosecution proved his guilt beyond a reasonable doubt).

The majority's fear that inarticulate jurors will be prejudiced or intimidated by this sentence is fanciful. The sentence states no requirement of articulation, and it never mentions that word. If there were little more to this instruction than the challenged sentence, its potential for misleading the jury would have been highlighted. But the saving grace of this trial court's instructions is that they said too much, not too little, and much of what they said – eleven out of fourteen sentences on reasonable doubt alone – was entirely correct and unobjectionable.

The majority's final worry is that the "give a good reason" standard somehow magnified the potential errors in the "grave uncertainty," "moral certainty," and "substantial doubt" phrases so that together, they effectively lowered the state's burden of proof. This conclusion is an unreasoned *ipse dixit* and deserves no rebuttal.[6] Yet it is

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[6] Three previous cases from this court have considered instructions substantially similar to the *Humphrey* instruction, and all three instructions were found to be constitutional. *See Schneider v. Day*, 73 F.3d 610 (5th Cir. 1996); *Weston v. Ieyoub*, 69 F.3d 73 (5th Cir. 1995); *Gaston v. Whitley*, 67 F.3d 121 (5th Cir. 1995).

only when all four phrases are taken in combination that the majority are willing to say this instruction is unconstitutional. The majority's conclusion, however, rests only on phrases and flatly ignores the Supreme Court's insistence that we look to the jury instructions as a whole.

Let me reiterate that I do not condone the *Humphrey* instruction insofar as it contains dubious and potentially misleading phrases. But paraphrasing Judge Friendly, I believe the instruction is "not approved" and "perhaps unwise," but it is not unconstitutional. I respectfully dissent.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-31101

ELMO HUMPHREY, III,

Petitioner-Appellant,

v.

BURL CAIN, Acting Warden,
Louisiana State Penitentiary,

Respondent-Appellee.

Appeal from the United States District Court
For the Eastern District of Louisiana

(Filed Aug. 14, 1997)

Before HIGGINBOTHAM, SMITH and BARKSDALE, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

This is a federal habeas petition seeking relief from a state court conviction for aggravated rape. Elmo Humphrey, III, had no criminal record but found himself accused of rape by a troubled sixteen-year-old girl. The rapes allegedly took place more than five years earlier. The victim had retracted an earlier accusation against Humphrey and had no witnesses or medical testimony to support her story. Nevertheless, a Louisiana jury convicted Humphrey by a vote of 11 to 1.

We conclude that the reasonable doubt instruction did not give the defendant the benefit of reasonable doubt as elucidated by the Supreme Court in *In Re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970), *Cage v. Louisiana*, 498 U.S. 39, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990) (per curiam), and *Victor v. Nebraska*, 511 U.S. 1, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994). Circuit precedent, however, requires us to hold that Humphrey's claim rests on a new rule and thus is unavailable in a habeas proceeding.

I.

Petitioner Elmo Humphrey was a friend of Kathy Calhoun when she lived in Metairie, Louisiana. Starting in early 1980, Calhoun engaged Humphrey to baby-sit her nine-year-old daughter J. and J.'s brother. Humphrey looked after the children regularly while the Calhouns lived in Metairie and on one occasion after the family moved. The trial evidence regarding the date of this move is equivocal, but the jury could have concluded that the family moved from Metairie in March of 1982. In 1987, J., then sixteen, told her mother about sexual encounters with Humphrey. Calhoun informed the police. On January 21, 1988, a Louisiana grand jury indicted Humphrey for aggravated rapes occurring between January 1, 1980, and December 31, 1984.

The trial judge gave the following instruction to the jury:

> If you entertain any reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your sworn duty to give

> him the benefit of that doubt and return a verdict of acquittal. Even where the evidence demonstrates a probability of guilt, yet if it does not establish it beyond a reasonable doubt, you must acquit the accused. This doubt must be a reasonable one, that is, one founded upon a real, tangible, substantial basis, and not upon mere caprice, fancy or conjecture. It must be such a doubt as would give rise to a grave uncertainty, raised in your minds by reason of the unsatisfactory character of the evidence; one that would make you feel that you had not an abiding conviction to a moral certain[ty] of the defendant's guilt. If, after giving a fair and impartial consideration to all of the facts in the case, you find the evidence unsatisfactory upon any single point indispensably necessary to constitute the defendant's guilt, this would give rise to such a reasonable doubt as would justify you in rendering a verdict of not guilty. The prosecution must establish guilt by legal and sufficient evidence beyond a reasonable doubt, but the rule does not go further and require a preponderance of testimony. It is incumbent upon the State to prove the offense charged, or legally included in the Information, to your satisfaction and beyond a reasonable doubt. A reasonable doubt is not a mere possible doubt. It should be an actual or substantial doubt. It is such a doubt as a reasonable man would seriously entertain. It is a serious doubt, for which you could give good reason.

The jury convicted Humphrey of the rape charges by an 11-1 vote. The trial judge sentenced him to life in prison at hard labor without parole. In his appeal, he argued that the reasonable doubt instruction given to his

jury was deficient. *State v. Humphrey*, 544 So. 2d 1188 (La. Ct. App.), *writ denied*, 550 So. 2d 627 (La. 1989). Humphrey sought post-conviction relief in the Louisiana courts. He raised the reasonable doubt issue again and added a claim that he was prosecuted illegally because the statute of limitations had expired. The Louisiana courts denied relief. Humphrey then filed this federal habeas petition, which raises the same issues. The district court rejected both contentions, but it granted a certificate of probable cause, and we appointed counsel.

II.

The district court issued its certificate of probable cause on November 27, 1995. While this appeal was pending, the Anti-terrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996), became effective. This statute amended 28 U.S.C. § 2253 to require a certificate of appealability, rather than a certificate of probable cause, before a final order in a habeas proceeding may be appealed. It also modified the circumstances in which federal courts may grant writs to state prisoners. *See* 28 U.S.C. § 2254(d) (West Supp. 1997).

Neither of these changes affects Humphrey's petition. We held in *Brown v. Cain*, 104 F.3d 744, 749 (5th Cir.), *cert. denied*, ___ U.S. ___, 117 S. Ct. 1489, 137 L. Ed. 2d 699 (1997), that the AEDPA's certificate-of-appealability requirements do not apply to a petitioner who obtained a certificate of probable cause before the new statute went into effect. And the Supreme Court recently held that, except in certain capital cases, the new version of section 2254(d) does not apply retroactively to petitions filed

before the new statute's effective date. *Lindh v. Murphy*, ___ U.S. ___, 117 S. Ct. 2059, ___ L. Ed. 2d ___ (1997); *Shute v. Texas*, 117 F.3d 233, 235 (5th Cir. 1997) (on rehearing). Thus, we must analyze Humphrey's claims under the old version of the habeas statute.

III.

A.

Because it is a threshold question, *see Caspari v. Bohlen*, 510 U.S. 383, 389, 114 S. Ct. 948, 953, 127 L. Ed. 2d 236 (1994), we turn first to the question of whether Humphrey can rely on *Cage* and *Victor*, decided by the Supreme Court after his conviction became final. In *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989), the Supreme Court narrowed the relief available to a habeas petitioner under 28 U.S.C. § 2254 by confining a petitioner to rules of constitutional law in place when certiorari is denied on direct appeal of his conviction. But *Teague* did not withdraw two categories of newly announced rules. Subscribing to Justice Harlan's view of the central purposes of the writ of habeas corpus, *Teague* accepted two limitations on the general prohibition against looking to new law.

> First, a new rule should be applied retroactively if it places "certain primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Mackey [v. United States]*, 401 U.S. [667,] 692 [(1971)]. Second, a new rule should be applied retroactively if it requires the observance of "those procedures that . . . are 'implicit in the concept of ordered liberty.' " *Id.* at 693 (quoting *Palko v.*

> *Connecticut*, 302 U.S. 319, 325 (1937) (Cardozo, J.)).

489 U.S. at 307, 109 S. Ct. at 1073. *Teague* added to the limits of Justice Harlan's suggested withdrawal of federal habeas review of state convictions the requirement that the error must also implicate the accuracy of the fact determination; that it must "seriously diminish the likelihood of obtaining an accurate conviction." *Id.* at 1078. *See also Sawyer v. Smith*, 497 U.S. 227, 242, 110 S. Ct. 2822, 2831, 111 L. Ed. 2d 193 (1990) (explaining that a new rule within *Teague*'s second exception must both implicate accuracy and alter "our understanding of the 'bedrock procedural elements' essential to the [fundamental] fairness of a proceeding").

In our view, the Supreme Court has made it plain that *Cage-Victor* errors fit with the second *Teague* exception. The Court in *Sullivan v. Louisiana*, 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993), explained that denying the right to a jury verdict beyond a reasonable doubt is a structural defect. Such an error takes away a " 'basic protectio[n]' whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function." *Id.* at 281, 113 S. Ct. at 2083. In other words, a jury that purports to convict based on a constitutionally defective reasonable-doubt instruction has in fact not rendered any conviction at all.

Other circuits have reached the same conclusion. According to the Eleventh Circuit, *Sullivan* and *Cage*, when taken together, indicate that "an improper reasonable doubt instruction undermines the fundamental fairness of *every* trial in which it is used." *Nutter v. White*, 39

F.3d 1154, 1158 (11th Cir. 1994) (emphasis in original). The Fourth Circuit reached a different result in *Adams v. Aiken*, 965 F.2d 1306 (4th Cir. 1992), *cert. denied*, 508 U.S. 974, 113 S. Ct. 2966, 125 L. Ed. 2d 666 (1993), but after deciding *Sullivan*, the Supreme Court granted certiorari on rehearing and remanded for reconsideration. 511 U.S. 1001, 114 S. Ct. 1365, 128 L. Ed. 2d 42 (1994). With the benefit of *Sullivan*'s concept of structural error, the court of appeals decided that *Cage-Victor* errors fall within *Teague*'s second exception. *Adams v. Aiken*, 41 F.3d 175, 179 (4th Cir. 1994), *cert. denied*, 515 U.S. 1124, 115 S. Ct. 2281, 132 L. Ed. 2d 284 (1995).

We need not fear that finding no *Teague* bar to claims such as Humphrey's will spawn scores of new habeas petitions. Prisoners who file petitions after April 24, 1996, must surmount the formidable barriers erected by the Anti-terrorism and Effective Death Penalty Act. Of course, we do not have occasion to measure how high those barriers might be. We note only that the one-year statute of limitations, *see* 28 U.S.C. § 2244(d) & 2255, the restrictions on successive petitions, *see* 28 U.S.C. § 2244(b) & 2255, and the heightened standard of review for state prisoners, *see* 28 U.S.C. § 2254(d)(1), could shut out future petitioners in Humphrey's situation.

Our circuit precedent, however, requires us to hold that *Cage* and *Victor* do not fall within an exception to *Teague*. The state directs our attention to *Johanson v. Whitley*, No. 94-30098 (5th Cir. 1994) (unpublished), *cert. denied*, 513 U.S. 1175, 115 S. Ct. 1155, 130 L. Ed. 2d 1112 (1995). Two other panels of this court recently cited an even earlier unpublished opinion holding that *Cage-Victor* analysis is not available on habeas review. *United States v.*

Shunk, 113 F.3d 31, 37 (5th Cir. 1997); *Brown v. Cain*, 104 F.3d 744, 753 (5th Cir.), *cert. denied*, ___ U.S. ___, 117 S. Ct. 1489, 137 L. Ed. 2d 699 (1997) (both citing *Smith v. Stalder*, No. 93-3683 (5th Cir. 1994) (per curiam) (unpublished)).[1] These unpublished opinions were binding when filed, and absent relief from the court sitting en banc this panel must abide them. 5TH CIR. LOCAL R. 47.5.3 ("Unpublished opinions issued before January 1, 1996 are precedent."); *Brown*, 104 F.3d at 753 ("A panel is not at liberty to disagree with the decision of a prior panel."). In spite of our view that *Sullivan* makes *Cage* available retroactively, this panel may not grant Humphrey the relief he requests.

B.

Of course, en banc consideration of the availability of collateral attack on the reasonable-doubt instruction would be futile if Humphrey is destined to defeat on the merits. We believe that Humphrey's claim has merit. In other words, we believe that his trial involved a reversible *Cage*-type error. Because Humphrey must seek relief from the en banc court in any event, we examine the merits simply to show that his contention has force and that – in the absence of a *Teague* bar – the full court's attention will not be in vain.

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[1] Panels of this court have declined to rest on *Smith v. Stalder* when a habeas petitioner would be unable to prevail on the merits in any case. *See Schneider v. Day*, 73 F.3d 610 (5th Cir. 1996) (per curiam); *Weston v. Ieyoub*, 69 F.3d 73 (5th Cir. 1995); *Gaston v. Whitley*, 67 F.3d 121 (5th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S. Ct. 2561, 135 L. Ed. 2d 1078 (1996) (all reaching the merits and denying relief based on *Victor* without explicitly holding that *Cage-Victor* errors are available retroactively).

Humphrey argues that the instructions given to the jury at his trial, when considered as a whole, were defective under *Cage* and *Victor*.[2] We must therefore look to see if the combination of phrases defining reasonable doubt – "grave uncertainty," "moral certainty," "actual or substantial doubt," and "a serious doubt, for which you could give good reason" – denied him a constitutional jury trial.

We examine the reasonable doubt instruction given here to determine "whether there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the *Winship* standard." *Victor v. Nebraska*, 511 U.S. 1, 6, 114 S. Ct. 1239, 1243, 127 L. Ed. 2d 583 (1994). Humphrey's jury was instructed that it could acquit only if it had "a serious doubt, for which you could give good reason." As we will explain, this instruction, in tandem with the language of "moral certainty," "grave uncertainty," and "substantial doubt," denied the jury in Humphrey's case the guidance demanded by due process and required by *In re Winship*.

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[2] Humphrey has represented himself throughout the habeas process. He filed an appellate brief on January 11, 1996. Because this court opted to hear oral argument, we appointed counsel six months later and gave leave to file a supplemental brief on Humphrey's behalf. We are obliged to construe Humphrey's pro se brief liberally. *See Guidroz v. Lynaugh*, 852 F.2d 832, 834 (5th Cir. 1988). The later filing of a brief by appointed counsel does not alter this obligation. *See Blankenship v. Estelle*, 545 F.2d 510, 514 (5th Cir. 1977) (refusing to find waiver where appointed counsel filed a brief in federal district court that omitted grounds for habeas because the petitioner raised those grounds in state habeas proceedings and in his pro se application for habeas relief).

Courts have long struggled with the task of instructing juries regarding "reasonable doubt." Efforts often collapse into tautological restatements – such as that reasonable doubt is a doubt based on reason. This resistance to capture reflects the reality that reasonable doubt is the quintessential black box decision – a decision which demands the answer "yes or no," but in which we should not insist on an exhaustive explanation. "I just wasn't convinced" is a permissible response but may be difficult to support with articulable reasons.

To insist, as the trial judge did here, that the jury must find a "serious doubt for which you could give good reason" lightens the state's burden and removes a substantial protection assured defendants. Faced with the uncertainties of conflicting testimony, and conscious of their awesome responsibility to guard justice, juries routinely scrutinize their instructions for help in sorting out the complexities presented by opposing counsel. A reasonable doubt instruction is not a technical nicety; for a jury, it is a basic proposition of its constitution. Undecided jurors may analyze their own doubts time after time in light of the instruction before settling on a decision. By the same token, jurors who have already made up their minds may recite the instruction time after time in order to bring undecided jury members over to their side. Insisting that a juror be able to articulate *a* reason is a troublesome step upon residual doubt. But our focus today is upon an instruction that went further. A juror favoring guilt would have a powerful tool if he could demand that undecided jurors articulate *good* reasons for considering an acquittal. Such a juror could use Humphrey's reasonable-doubt instruction to argue that

it's not enough to have a reason to acquit – that one must have an especially strong, compelling, or persuasive reason for doubting the defendant's guilt. He could plausibly assert that a paucity of government evidence should not count as a "good" reason. Under this sort of pressure, inarticulate and undecided jurors are less likely to give defendants the benefit of their doubts. Requiring articulation of good reasons, then, skews the deliberation process in favor of the state by suggesting that those with doubts must perform certain actions in the jury room – actions that many individuals find difficult or intimidating – before they may vote to acquit.

This cardinal vice in the charge might alone deprive a defendant of an essential element of his right to trial by jury in a criminal case – an issue we do not consider – for it surely does so in tandem with the use of "substantial doubt," "grave uncertainty," and "moral certainty," criticized by this court and the Supreme Court. *See Victor*, 511 U.S. at 19-22, 114 S. Ct. at 1250-51 (disapproving of the use of "moral certainty" and "substantial doubt"); *Schneider v. Day*, 73 F.3d 610, 612 (5th Cir. 1996) (same); *Weston v. Ieyoub*, 69 F.3d 73, 75 (5th Cir. 1995) (same); *Gaston v. Whitley*, 67 F.3d 121, 123 (5th Cir. 1995) (same), *cert. denied*, ___ U.S. ___, 116 S. Ct. 2561, 135 L. Ed. 2d 1078 (1996). In *Victor*, the Supreme Court returned to its earlier *Cage* decision and explained that not every use of these phrases in a reasonable doubt instruction is constitutional error. At the same time, the Court reaffirmed the principle of *Cage* and *Winship* that the charge must not allow the jury to convict unless it is convinced that the evidence demonstrates guilt beyond a reasonable doubt. It left no uncertainty that the inquiry continues to be "not whether

the instruction 'could have' been applied in [an] unconstitutional manner, but whether there is a reasonable likelihood that the jury *did* so apply it." 511 U.S. at 6, 114 S. Ct. at 1243 (emphasis in original) (citing *Estelle v. McGuire*, 502 U.S. 62, 72-73 & n.4, 112 S. Ct. 475, 482 & n.4, 116 L. Ed. 2d 385 (1991)). Here we have an effort to define reasonable doubt with all the phrases that (although panned by the Court) survived constitutional attack in *Victor*, but they are coupled with an additional potent qualifier. Arguably, jurors were not allowed to entertain doubt without being able to express a *good* reason. The abiding conviction of guilt to a moral certainty could abide only if the juror could offer a good explanation.

Even before *Cage* was announced, a reasonable doubt instruction that required articulation of a good reason was of dubious constitutionality, standing alone and apart from its dissipating effect upon the context essential to the survival of the instruction in *Victor*. In *Dunn v. Perrin*, 570 F.2d 21, 23 (1st Cir.), *cert. denied*, 437 U.S. 910, 98 S. Ct. 3102, 57 L. Ed. 2d 1141 (1978), the First Circuit criticized an instruction that cast reasonable doubt as "doubt as for the existence of which a reasonable person can give or suggest a good and sufficient reason." While acknowledging that this error by itself might not merit reversal, the court stated that such an instruction "suggest[s] that a doubt based on reason was not enough to acquit, implicitly putting petitioners to the task of proving that the reason was 'good and sufficient.' " *Id.* (footnote omitted). In conjunction with the phrase "strong and

abiding conviction," *id.* at 24, and authorization to convict even without verifiable information, *id.*, this instruction rose to a violation of due process.[3]

It is true that the Second Circuit and other courts have refused to reverse convictions with articulation-demanding reasonable-doubt instructions. But none of these cases has faced the array of reasonable-doubt qualifiers contained in the charge to Humphrey's jury. In *Vargas v. Keane*, 86 F.3d 1273, 1277-79 (2d Cir.), *cert. denied*, ___ U.S. ___, 117 S. Ct. 240, 136 L. Ed. 2d 169 (1996), the Second Circuit held that an instruction survived due-process scrutiny in spite of its characterization of reasonable doubt as "doubt for which you can give a reason if called upon to do so by a fellow juror in the jury room." But the instruction apparently did not contain the other problematic phrases that appeared in Humphrey's jury charge. Significantly, it did not require jurors to be able to articulate a "good" reason. The court concluded that the

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[3] In *Robinson v. Callahan*, 694 F.2d 6, 7 (1st Cir. 1982), the First Circuit, without providing any reasoning, held that an instruction describing reasonable doubt as doubt "for which you could give *a* reason" (emphasis supplied) was not constitutional error. *Robinson* relied on an earlier opinion, *Tsoumas v. State*, 611 F.2d 412 (1st Cir. 1980). But *Tsoumas* examined language quite different: "It is not a frivolous or fanciful doubt, nor is it one that can easily be explained away." *Id.* at 412. In fact, *Tsoumas* explicitly *upheld* the reasoning of *Dunn*, which, as noted, cut the other way. It is unclear what, if anything, *Robinson* stands for today. *See also Gilday v. Callahan*, 59 F.3d 257, 261 (1st Cir. 1995) (approving an instruction that "a reasonable doubt is an uncertainty 'based upon a reason' " without mentioning *Dunn*, *Tsoumas*, or *Robinson*), *cert. denied*, ___ U.S. ___, 116 S. Ct. 1269, 134 L. Ed. 2d 216 (1996).

entirety of the instruction did not eliminate the jurors' authorization to acquit based on residual doubt. "Viewed in context, the challenged language simply does not suggest that a doubt formulated within one's own mind – reasonable, but not articulable – is insufficient for acquittal." *Id.* at 1278.

The *Vargas* court relied in part on another post-*Cage* Second Circuit case that approved a similar instruction. The court in *Chalmers v. Mitchell*, 73 F.3d 1262, 1268-69 (2d Cir.), *cert. denied*, ___ U.S. ___, 117 S. Ct. 106, 136 L. Ed. 2d 60 (1996), approved an instruction that defined a reasonable doubt as "a doubt for which some good reason can be given." In the process, however, it warned that defining reasonable doubt by reference to a "good reason" is "an incorrect statement of law which should never be made." *Id.* at 1266. It described *Dunn* with approval and distinguished *Dunn* based on the absence of other troubling phrases and the presence of corrective language.

> The trial court's next sentence after mentioning the contested "good reason" explained that "[t]he doubt, to be reasonable, must *therefore* arise because of the nature and quality of the evidence in the case, or from the lack or insufficiency of the evidence in the case." Thus the trial court's use of the word "good" was intended, and likely understood, to mean that the proper foundation of a reasonable doubt was in fact rather than fantasy.

Id. at 1268 (emphasis in original). *See also Beverly v. Walker*, ___ F.3d ___, ___, 1997 WL 358601, at *4 (2d Cir. 1997) ("[A]lthough the [requirement of a] 'good sound substantial' [reason] should not be used, and we applaud

the [New York state court] for condemning it in the exercise of its supervisory authority, we cannot conclude that the entire charge was constitutionally deficient."), *petition for cert. filed*, ___ U.S.L.W. ___ (U.S. Jul. 17, 1997) (No. 97-5232). Because Humphrey's instruction contained the expressions "grave uncertainty," "moral certainty," and "actual or substantial doubt," as well as the qualifier "good," this case presents a more serious due process problem than the *Vargas* or *Chalmers* courts faced.

A handful of other cases have affirmed convictions when the court instructed the jury that it must articulate its doubts, but only one case had the benefit of *Cage*. In that case, the D.C. Circuit approved a pattern instruction that defined reasonable doubt as "a doubt for which you can give a reason." *United States v. Dale*, 991 F.2d 819, 853 (D.C. Cir.) (per curiam), *cert. denied*, 510 U.S. 906, 114 S. Ct. 286, 126 L. Ed. 2d 236, *and cert. denied*, 510 U.S. 1030, 114 S. Ct. 650, 126 L. Ed. 2d 607 (1993). As in *Vargas* and *Chalmers*, the instruction steered clear of further reasonable-doubt shoals. The court quickly concluded that it was substantially equivalent to *Cage*'s definition of reasonable doubt as doubt "founded upon a real tangible substantial basis and not upon mere caprice and conjecture." *Id.* Like the pre-*Cage* cases, *Dale* did not discuss whether an articulation requirement compromises due process rights when given in conjunction with other problematic instructions. *See Leecan v. Lopes*, 893 F.2d 1434, 1443-44 (2d Cir.) (following precedent and holding that a petitioner who did not object at trial could not obtain a writ where the instruction referred to "a doubt for which a reasonable man can give a valid reason" and failed to state that lack of evidence can be a basis for

reasonable doubt), *cert. denied*, 496 U.S. 929, 110 S. Ct. 2627, 110 L. Ed. 2d 647 (1990); *Murphy v. Holland*, 776 F.2d 470, 476-79 & n.4 (4th Cir. 1985) (allowing an instruction referring to "a doubt for which a reason can be given," "actual and substantial" doubt, and "not a mere possible doubt," but noting that inarticulable doubt can be reasonable doubt and emphasizing lengthy curative instructions), *vacated on other grounds*, 475 U.S. 1138, 106 S. Ct. 1787, 90 L. Ed. 2d 334 (1986); *United States v. Davis*, 328 F.2d 864, 867-68 (2d Cir. 1964) (Friendly, J.) (criticizing an articulation-demanding reasonable doubt instruction prior to *Winship*, but refusing to analyze its constitutionality because the petitioner failed to object at trial).

The offending language in Humphrey's case has been contained in cases in which this court has rejected other reasonable-doubt objections. *See, e.g., Schneider v. Day*, 73 F.3d 610 (5th Cir. 1996) (a similar instruction containing the phrases "substantial doubt" and "moral certainty" and requiring articulation of a good reason); *Weston v. Ieyoub*, 69 F.3d 73 (5th Cir. 1995) (an identical instruction); *Bias v. Ieyoub*, 36 F.3d 479, 481 (5th Cir. 1994) (same). Those panels, however, were not faced with and did not consider whether the requirement that a juror be able to articulate a good reason, in addition to the phrases "grave uncertainty," "moral certainty," and "actual or substantial doubt," made the proffered instruction unconstitutional. In other words, we have not decided the issue we face today. As discussed above, where a jury instruction has been weakened by the phrases disapproved of in *Cage* and *Victor*, the requirement that a juror be able to articulate a good reason leaves the constitutionality of the instruction beyond repair.

The facts of this case offer a powerful example of the centrality to criminal trials of the role of reasonable doubt and the importance of its explanation to the jury. This was a close and difficult case. There was only one witness against Humphrey. J. testified that Humphrey had sex with her "more than twenty times" and that these incidents happened "[t]he whole time [J.] lived" at the home in Metairie. She could not state the specific dates of any of the rapes. She could not state how many rapes occurred. She could not say when she moved from the home in Metairie, only that it was "in 1981 or '82." By the age of fourteen, J. was using drugs and engaging in promiscuous behavior. When she failed the ninth grade, J. claimed her mother neglected her. J. admitted that she had problems with depression and alcohol abuse and that she had previously accused Humphrey of inappropriate sexual touching but later changed her story. J.'s mother admitted that at that time J. was unreliable and untruthful.

The state gave the jury little in support of J.'s version of events. It did not call J.'s brother as a witness, even though he was present on many or all of the baby-sitting occasions. The state did not call J.'s grandmother, to whom J. first reported the sexual abuse and later recanted. The state presented no medical evidence of J.'s condition. Instead, the state relied on a "child sexual abuse accommodation syndrome" expert. This "expert" had an undergraduate degree in sociology, a masters degree in social work, and had attended workshops sponsored by groups active in rape issues. She had never examined J. However, over objection, she offered her expert opinion that children subjected to incest may repress the memory

for years, engage in drug abuse or promiscuous behavior, and report the incident and then retract it. That is, this syndrome was used to explain J.'s erratic behavior. On the other hand, the defense offered expert testimony of a 65% false reporting phenomenon in child abuse cases.

Of course, a case need not be close in order for us to find reversible error in the reasonable-doubt instruction. But Humphrey's is a close case nevertheless and makes clear the importance of affording defendants the rights established in *Cage* and reinforced in *Victor*. This is not to suggest that Humphrey's conviction was not supported by sufficient evidence; only that the evidence was meager and the conviction unpredictable.

While the Court has noted that the reasonable doubt standard "defies easy explication," *Victor*, 511 U.S. at 5, 114 S. Ct. at 1242, we think that limiting reasonable doubt to doubt for which a good reason can be articulated, in conjunction with the other instructional errors in Humphrey's charge, creates a lower standard of proof than due process requires. We do not suggest that a jury ought to be instructed that it needs no reason. Rather, inability to articulate a good reason for doubt does not make the doubt unreasonable. In sum, we find it reasonably likely that the jurors understood the instruction to permit conviction upon a lesser burden than reasonable doubt as required by *Cage-Victor*.

IV.

Humphrey also argues that there is insufficient evidence of an offense within the limitations period. At the time of the offense, the statute of limitations was six

years. *See* LA. CODE CRIM. PROC. ANN. art. 572(1) (West 1981). The indictment was filed January 21, 1988, so Louisiana could prosecute any rape occurring on or after January 21, 1982. Effective September 10, 1987, Louisiana enacted a tolling provision: "The time limitations . . . shall not commence to run . . . until the relationship or status involved has ceased to exist where: . . . The offense charged is . . . aggravated rape . . . and the victim is under the dominion or control of the offender while under seventeen years of age." 1987 LA. SESS. LAW SERV. Act 587 (West). Louisiana follows the rule that amendments to the statute of limitations are valid retroactively only to crimes that are not prescribed when the amendment takes effect. *See Louisiana v. Adkisson,* 602 So. 2d 718 (La. 1992) (per curiam).

The prescriptive bite of Louisiana law is unclear when a defendant is convicted under an indictment that covers a period of time that is partly barred by the statute of limitations and partly within the statute of limitations. Assuming without deciding that the trial court here misapplied Louisiana law, the misapplication of Louisiana law does not rise to the level of a deprivation of constitutional right.

V.

Even though we find Humphrey's argument that the reasonable-doubt instruction given at his trial violates the standards promulgated by the Supreme Court in *Cage* and *Victor,* we are barred from granting relief by previous decisions in this circuit. This matter would be better

considered by an en banc court with the power to reconsider the entirety of the issue.

The district court's judgment denying the habeas petition is AFFIRMED.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ELMO HUMPHREY, III	*	CIVIL ACTION
	*	
VERSUS	*	NO. 95-0936
BURL CAIN WARDEN	*	SECTION: "T" (6)

REPORT AND RECOMMENDATION

(Filed July 31, 1995)

This matter was referred to the United States Magistrate Judge for the purpose of conducting a hearing, including an evidentiary hearing, if necessary, and submission of proposed findings and recommendations for disposition pursuant to Title 28, United States Code, Sections 636(b)(1)(B) and (C), and, as applicable, Rule 8(b) of the Rules Governing Section 2254 cases.

Upon review of the entire record, the Magistrate Judge has determined that this matter can be disposed of without an evidentiary hearing. Therefore, the Magistrate Judge issues this Report and Recommendation in accordance with the applicable law, thereby recommending that the instant application for federal *habeas corpus* relief be **DENIED.**

Procedural Background

Petitioner, Elmo Humphrey, III, is a state prisoner currently incarcerated in the Louisiana State Penitentiary in Angola, Louisiana. Petitioner's incarceration stems from his 1988 jury conviction for aggravated rape of a child whose care was entrusted to him in violation of La. R.S. 14:42(A)(4). The Court sentenced petitioner to life

imprisonment at hard labor, without benefit of parole, probation or suspension of sentence, with credit for time served.[1]

Petitioner's conviction and life sentence were affirmed on appeal.[2] In response to petitioner's claims on appeal, the Louisiana Fifth Circuit held that: (1) the prosecution's opening statement reference to petitioner's alleged inculpatory statements did not necessitate a mistrial; (2) the petitioner's counsel was properly precluded from asking the victim about a gynecological examination she underwent following a rape; and, (3) the trial court's lengthy definition of probable cause did not give rise to a constitutional or otherwise reversible error. Petitioner's request for a writ of certiorari was denied by the Louisiana Supreme Court.[3]

Petitioner then sought post-conviction relief in the trial court where he alleged that he had been denied due process of law and that he had been illegally prosecuted in violation of the prohibition of use of an ex post facto law because the crime he was prosecuted on had prescribed. Petitioner also claimed that the trial court's jury instruction on reasonable doubt violated his constitutional right to due process. The trial court denied petitioner's application. Petitioner brought the same issues on appeal from denial of post-conviction relief. The court

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[1] ***State v. Humphrey, III,*** Case No. 88-223, Division "F", Twenty-Fourth Judicial District Court, parish of Jefferson (Sept. 1988).

[2] ***State v. Humphrey,*** 544 So.2d 1188 (La. App. 5th Cir. 1989).

[3] ***State v. Humphrey,*** 550 So.2d 627 (La. 1989).

of appeal[4] and the Louisiana Supreme Court[5] denied relief.

In the instant petition filed pursuant to Title 28, United States Code, Section 2254, petitioner raises the following claims for relief: (1) petitioner's conviction violates the prohibition against ex post facto laws; (2) the trial court lacked jurisdiction to prosecute petitioner because of prescription; and, (3) the jury instruction on reasonable doubt denied petitioner due process of law. The state concedes that petitioner has exhausted his state court remedies and a review of the state court record confirms the same. Thus, petitioner's claims for *habeas* relief are properly before this court. ***Rose v. Lundy,*** 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982); ***Dupuy v. Butler,*** 837 F.2d 699, 702 (5th Cir. 1988).

Ex Post Facto and Jurisdiction

Petitioner claims that his conviction and sentence are illegal because they were obtained in violation of the constitutional prohibition relative to ex post facto laws[6]

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[4] ***State of Louisiana ex rel Elmo Humphrey, III v. Whitley,*** Case No. 92-KH-454 (La. App. 5th Cir. May 1992).

[5] ***State ex rel Elmo Humphrey, III v. Whitley,*** Case No. 92-KH-2252 (La. 1994).

[6] An ex post facto law is defined as follows:

> **Ex post facto law.** A law passed after the occurrence of a fact or commission of an act, which retrospectively changes the legal consequences or relations of such fact or deed. A law is unconstitutionally "ex post facto" if it deprives the defendant of a defense to criminal liability that he

and that as such the trial court had no jurisdiction over petitioner because the charged offense had prescribed. The respondent correctly points out that at the time of petitioner's commission of the crime of aggravated rape, the time limitations for prosecution of said crime were provided for in La.C.Cr. P. Art. 572[7] which mandated a six year prescriptive period for offenses necessarily punishable by imprisonment at hard labor. Aggravated rape is punishable by life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. La.R.S. 14:42(C).

The state court record shows that petitioner was engaged by Kathy Calhoun to babysit with her daughter, J.M., from early 1980 until March 1982, at which time the family moved from Metairie to New Orleans. J.M. was born October 20, 1971, making her approximately nine years old when petitioner began molesting her. At trial,

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had prior to enactment of the law. ***State v. Rogers,*** Ohio Com.Pl., 346 N.E.2d 352, 361. Art. I, § 9(C1.3) and § 10 of U.S. Const. prohibit both Congress and the states from passing any *ex post facto* law. Most state constitutions contain similar prohibitions against *ex post facto* law.

Black's Law Dictionary, 580 (6th ed. 1990).

Also see, LSA-Const. Art. I, § 23.

[7] **Art.572.** provides in pertinent part:

No person shall be prosecuted, tried, or punished for an offense not punishable by death unless the prosecution is instituted within the following periods of time after the offense has been committed:

(1) Six years, for a felony necessarily punishable by imprisonment at hard labor; . . .

the victim testified that the sexual activity with petitioner continued for the entire two year period during which she resided at 1565 Lake Avenue, Metairie, Louisiana.[8] She also testified that petitioner last babysat her in March 1984 at his trailer located in Jefferson Parish.[9] In 1987, when J.M. was sixteen years old, she told her mother about the sexual abuse, resulting in petitioner's indictment, on January 21, 1988, for a violation of La.R.S. 14:42(A)(4). ***See State v. Humphrey,*** 544 So.2d 1188 (La. App. 5th Cir. 1989). The bill of indictment charged petitioner with the crime of aggravated rape upon the victim occurring between January 1, 1980, and December 31, 1984.[10] At trial, the state argued that the sexual molestation was a continuing act which covered the time span noted in the bill of information.

As petitioner concedes, the applicable time limitations for his crime are established by La.C.Cr.P. Art. 572 and the exceptions for same are provided for in La. C.Cr. P. Art. 573. In 1987, Art. 573 was amended to provide that, in cases of aggravated rape and other sex offenses, the time limitation did not begin to run until the relationship or status involved had ceased to exist. Petitioner argues first that his prosecution was untimely under that

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[8] The victim said that petitioner had sex with her over twenty times at her home located at 1565 Lake Avenue between the years 1980-1982. (State Court Record, Vol. 5, Transcript page 613, 620, hereinafter referred to as T. ___).

[9] Specifically, J.M. testified that her mother left her with petitioner at his trailer overnight in 1984, even though the victim did not want to stay with the petitioner because of "what he was doing to me." (T. 712, 741 and 758-759).

[10] State Court Record, Volume I, p. 19.

Art. 572 and second, that Art. 573 is inapplicable to his case.

Specifically, petitioner argues that the last inferred sexual contact with the victim occurred in 1982 and not 1984, as indicated in the bill of information. (Rec. Doc. No. 5, p. 4, Traverse to State's Memorandum in opposition to Application for Habeas Corpus). He further asserts that since there was insufficient evidence presented to the jury to establish that a rape occurred in 1984[11], the time for prosecution to commence relative to his offense had prescribed. Petitioner's calculations, however, are inaccurate. Even if this court accepts petitioner's premise that the last criminal act for which evidence was presented to the jury occurred in March 1982, the state would then have had until March 1988 to seek an indictment. As the indictment was filed on January 21, 1988, the state's commencement of prosecution was timely.

Alternatively, petitioner's argument that La.Cr.C.Pr. Art. 573 is inapplicable to his case also must fail. Petitioner argues that since the state failed to prove that an offense occurred in 1984, then the time limitation for prosecution had expired prior to the 1987 enactment of Art. 573(4), thus making Art. 573(4) inapplicable to his case. In 1987, La.C.Cr.P. Art. 573(4) provided:

> The time limitations established by Article 572 shall not commence to run as to the following offenses **until the relationship or status involved has ceased to exist** when:

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[11] Although the victim testified that petitioner babysat her at his trailer in 1984, she did not specifically testify that a rape occurred at that time.

(4) The offense charged is one of the following: aggravated battery (R.S. 14:34), **aggravated rape (R.S. 14:42)**, forcible rape (R.S. 14:42.1), sexual battery (R.S. 14:43.1), aggravated sexual battery (R.S. 14:43.2), oral sexual battery (R.S. 14:43.4), aggravated oral sexual battery (14:43.4), carnal knowledge of a juvenile (R.S. 14:80), indecent behavior with juveniles (R.S. 14:81), molestation of a juvenile (R.S. 14:81.2), crime against nature (R.S. 14:89) or aggravated crime against nature (R.S. 14:89.1), and the victim is under seventeen years of age.

Since La.C.Cr. P. Art 573(4) was enacted in 1987, during a time when the state could still have timely prosecuted petitioner for offenses occurring as late as 1982, Art. 573(4) is indeed applicable to petitioner's crimes. *See*, ***United States v. Johns***, 15 F.3d 740, 743 (8th Cir. 1994) (holding that in a prosecution involving sexual offenses on a minor, the legislative extension of a limitation period enacted before prosecution would be otherwise barred did not violate the ex post facto clause.)

Further, review of the record in this case shows the victim knew the petitioner from 1975 to 1985[12] and that petitioner continued in the role of babysitter to the victim as late as 1984. Since the **relationship** between petitioner and J.M. continued until 1984, pursuant to La. C. Cr. P. Art 573(4), the time limitations for prosecuting petitioner did not arguably begin to run until 1984 thus making the 1988 indictment timely.

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[12] T. 600.

The extension of time limitations in Art. 573 did not criminalize previously innocent conduct, enhance punishment nor did it deprive the petitioner of a defense to criminal liability that he had prior to enactment of the law. Thus, the change in the prescriptive period did not subject petitioner to an ex post facto law. *See, **United States v. Brechtel,*** 997 F.2d 1108, 1113 (5th Cir.), *cert. denied,* ___ U.S. ___, 114 S.Ct. 605, 126 L.Ed.2d 570 (1993). Since prosecution of petitioner was timely commenced, the trial court had jurisdiction in this case. Petitioner's claims are meritless.

Erroneous Reasonable Doubt Instruction

In his next claim for *habeas* relief, petitioner contends that the jury was improperly instructed as to reasonable doubt. Specifically, petitioner contends that the jury received an instruction on reasonable doubt which was similar to the charge which the U.S. Supreme Court found unconstitutional in ***Cage v. Louisiana,*** 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990). While the record reflects that the language condemned in ***Cage*** is similar to that employed in petitioner's jury charge, petitioner is nevertheless not entitled to relief on this claim.

Petitioner's conviction and sentence became final on October 13, 1989 and ***Cage*** was decided on November 13, 1990. This Circuit has ruled that ***Cage*** is not to be applied retroactively to decisions which became final before ***Cage*** was decided. ***Skelton v. Whitley,*** 950 F.2d 1037, 1041-46 (5th Cir.), *cert. denied,* 113 S.Ct. 102, 121 L.Ed. 2d 61 (1992). In ***Skelton,*** the Fifth Circuit stated that ***Cage*** fashioned a "new rule" and is non-retroactive under ***Teague v.***

Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L. Ed.2d 334 (1989). Although there are two limited exceptions to the holding in *Teague*,[13] the Fifth Circuit has rejected the notion that faulty reasonable doubt instructions should merit the application of either *Teague* exception. *Skelton*, 950 F.2d at 1045. Therefore, following current Fifth Circuit precedent, it would appear that petitioner's claim regarding erroneous jury instructions must fail.

The Fifth Circuit has not reconsidered the issue of the retroactivity of *Cage* subsequent to the Supreme Court's decision in *Sullivan v. Louisiana*, 113 S.Ct. 2078, 2082 (1993).[14] However, at least one court in the Eastern

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[13] In *Teague*, 489 U.S. at 311, 109 S.Ct. at 1075, the Court held that a new rule will not be applied retroactively unless it falls within one of two narrow exceptions. The first exception is that a "new rule" should be retroactive only if it places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe. The second exception is that a "new rule" should be retroactive only if it requires the observance of those procedures that are implicit in the concept of ordered liberty. *Teague*, 489 U.S. at 311, 109 S.Ct. at 1076. This concept is applicable only to watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceedings. *Sawyer v. Smith*, 497 U.S. 227, 110 S.Ct. 2822, 2831, 111 L.Ed.2d 193 (1990).

[14] Although the state cites an unpublished Fifth Circuit opinion, *Johanson v. Whitley*, 36 F.3d 89 (5th Cir. 1994), *cert. denied*, 115 S.Ct. 1155, 130 L.Ed.2d 1112 (1995) for the proposition that *Skelton* still controls post-*Sullivan*, the state has failed to attach a copy of the opinion to its response brief. The court notes that two other circuit courts have considered the retroactivity of *Cage* after *Sullivan*, concluding that *Cage* should be applied retroactively. *See; Adams v. Aiken*, 41 F.3d 175, 178 (4th Cir. 1994), *on remand for reconsideration in light of Sullivan; Nutter v. White*, 39 F.3d 1154 (11th Cir. 1994).

District of Louisiana has questioned whether the holding in ***Skelton*** that ***Cage*** should not be applied retroactively would survive ***Sullivan.***[15] Therefore, in an abundance of caution, the Court will address the merits of petitioner's claim that the jury was improperly instructed on reasonable doubt.

The challenged instruction reads as follows:

> If you entertain any reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your sworn duty to give him the benefit of that doubt and return a verdict of acquittal. Even where the evidence demonstrates a probability of guilt, yet if it does not establish it beyond a reasonable doubt, you must acquit the accused. This doubt must be a reasonable one, that is, one founded upon a real, tangible, substantial basis, and not upon mere caprice, fancy or conjecture. It must be such a doubt as would give rise to a grave uncertainty, raised in your minds by reason of the unsatisfactory character of the evidence; one that would make you feel that you had not an abiding conviction to a moral certainty of the defendant's guilt. If, after giving a fair and impartial consideration to all of the facts in the case, you find the evidence unsatisfactory upon any single point indispensably necessary to constitute the defendant's guilty, this would give rise to such a reasonable doubt as would justify you in rendering a verdict of not guilty.

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[15] *See, **Patterson** v. **Whitley,*** C.A. 94-3472 "J", (E.D. La., April 11, 1995).

> The prosecution must establish guilt by legal and sufficient evidence beyond a reasonable doubt, but the rule does not go further and require a preponderance of testimony. It is incumbent upon the state to prove the offense charged, or legally included in the indictment, to your satisfaction, and beyond a reasonable doubt. A reasonable doubt is not a mere possible doubt. It would be an actual or substantial doubt. It is such a doubt as a reasonable man would seriously entertain. It is a serious doubt, for which you could give good reason.

(State Court Record, Vol. 1, p. 48.)

In ***Cage v. Louisiana,*** the U.S. Supreme Court held that a jury instruction equating reasonable doubt with a "grave uncertainty," and "actual substantial doubt", and a "moral certainty" suggested a higher degree of doubt than is constitutionally required to show reasonable doubt. ***Cage,*** 498 U.S. at 40, 111 S.Ct. at 329-30. The ***Cage*** court found that since a reasonable juror "could have" interpreted the jury instruction to allow a finding of guilt based on a lower degree of proof than "beyond a reasonable doubt" then the instruction violated the Due Process Clause. ***Id.***

However, in the Supreme Court's pronouncements on the issue of reasonable doubt since ***Cage,*** the Court has made clear that the proper inquiry is not whether the instruction "could have" been applied in an unconstitutional manner, but whether there is a reasonable likelihood that the jury did so apply it. *See,* ***Estelle v. McGuire,*** 502 U.S. 62, 112 S.Ct. 475, 482, 116 L.Ed.2d 385 (1991); ***Victor v. Nebraska,*** ___ U.S. ___, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994). Moreover, in ***Victor,*** the Supreme

Court stated that the language seen as problematic in the *Cage* instruction "cannot be sequestered from its surroundings". *Id.* at ___, 114 S.Ct. at 1248. Use of the phrases "moral certainty", "grave uncertainty" and "actual or substantial doubt" will not result in an unconstitutional jury instruction, under *Victor,* if the instruction as a whole conveys the correct standard of proof. *Victor,* ___ U.S. at ___, 114 S.Ct. at 1243.[16]

Having reviewed the standard set forth by the Supreme Court and applied by the Fifth Circuit since *Cage,* this Court concludes both that the jury instruction given at petitioner's trial "considered as a whole" conveyed the correct standard of proof and that there is no "reasonable likelihood" that the jury in petitioner's case applied the challenged instruction in a way which violated the Constitution. *Victor,* ___ U.S. at ___, 114 S.Ct. at 1243; *McGuire,* 502 U.S. ___ & n. 4, 112 S.Ct. at 482 & n. 4, 116 L.Ed.2d 385 (1991). In this case the jury was told that the defendant was presumed to be innocent until each element of the crime necessary to constitute him guilty is proven beyond a reasonable doubt. The jury was instructed to give the defendant the benefit of every reasonable doubt arising out of the evidence or lack thereof and was reminded of its sworn duty to return a verdict of not guilty if it was not convinced of defendant's guilt beyond a reasonable doubt. Although "reasonable doubt" was equated with an "actual, substantial doubt", "one that would make you feel that you had not

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[16] *See also; Bias v. Ieyoub,* 36 F.3d 479, 481 (5th Cir. 1994), upholding a *Cage* instruction which is similar to the instruction challenged herein by petitioner.

an abiding conviction to a moral certainty of defendant's guilt" and a doubt that would give rise to a "grave uncertainty", similar to the definition prohibited in *Cage*, reasonable doubt was also defined as one which a reasonable man would seriously entertain. Taken as a whole, the court finds that the instruction did not lower the state's burden of proof in obtaining petitioner's conviction. Therefore, petitioner's challenge to the reasonable doubt instruction is without merit.

Accordingly,

It is recommended that petitioner's application for *habeas corpus* relief be **DENIED.**

Failure to file written objections to the proposed findings and recommendation contained in this report within ten (10) days from the date of its service shall bar any aggrieved party from attacking the factual findings on appeal. ***Thomas v. Arn,*** 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985). *See also, **Nettles v. Wainwright,*** 677 F.2d 404, 410 (5th Cir. 1982).

New Orleans, Louisiana, this 31st day of July, 1995.

/s/ Louis Moore, Jr.
LOUIS MOORE, JR.
United States Magistrate Judge

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ELMO HUMPHREY, III

VERSUS

BURL CAIN WARDEN **SECTION "T"**

ORDER

(Filed Oct. 13, 1995)

The Court, having considered the complaint, the record, the applicable law, the Plaintiff's Opposition to the Magistrate's Report, and the Report and Recommendation of United States Magistrate Judge Louis Moore, Jr., hereby approves the Recommendation of the United Magistrate Judge and adopts it as its opinion in this matter. Therefore,

IT IS ORDERED that the petition of Elmo Humphrey, III for issuance of a writ of Habeas Corpus under 28 U.S.C. § 2254 is DENIED.

New Orleans, Louisiana, this 13th day of October, 1995.

/s/ Illegible
UNITED STATES DISTRICT JUDGE

APPENDIX E

[p. 119] JURY CHARGES

BY THE COURT:

Ladies and gentlemen, it is now my duty to instruct you on the law that applies to your deliberation. It is your duty to follow these instructions in reaching your verdict. Although you are the sole judges of the law and the facts on the question of guilt or innocence, you have the duty to accept and apply the law as given by the Court. You must decide the facts from the testimony and other evidence and apply the law to those facts in reaching your verdict.

You must not single out any of these instructions and disregard others. The order in which the instructions are given does not indicate that one instruction is more important than another.

If I have given you the impression that I have an opinion regarding any fact in this case, you are to disregard that impression. If I have given the impression that I have an opinion concerning the guilt or innocence of the defendant, you are to disregard that impression.

The defendant is presumed to be innocent until each element of the crime necessary to constitute his guilt is proven beyond a [p. 120] reasonable doubt. The defendant is not required to prove that he is innocent. Thus, the defendant begins the trial with a clean slate.

The burden is upon the State to prove the defendant's guilt beyond a reasonable doubt. In considering the evidence, you must give the defendant the benefit of every reasonable doubt arising out of the evidence or out

of the lack of evidence. If you are not convinced of the guilt of the defendant beyond a reasonable doubt, you must find him not guilty.

Reasonable Doubt.

If you entertain any reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your sworn duty to give him the benefit of that doubt and return a verdict of acquittal. Even where the evidence demonstrates a probability of guilt, yet if it does not establish it beyond a reasonable doubt, you must acquit the accused. This doubt must be a reasonable one, that is, one found upon a real, tangible, substantial basis, and not upon mere caprice, fancy or conjecture. It must be such a doubt it would give rise to a grave uncertainty, raised in your minds by reason of the [p. 121] unsatisfactory character of the evidence; one that would make you feel that you had not an abiding conviction to a moral certain of the defendant's guilt. If, after giving a fair and impartial consideration to all of the facts in the case you find the evidence unsatisfactory upon any single point indispensably necessary to constitute the defendant's guilt, this would give rise to such a reasonable doubt as would justify you in rendering a verdict of not guilty.

The prosecution must establish guilt by legal and sufficient evidence beyond a reasonable doubt, but the rule does not go further and require a preponderance of testimony. It is incumbent upon the State to prove the offense charged, or legally included in the indictment, to your satisfaction and beyond a reasonable doubt. A reasonable doubt is not a mere possible doubt. It should be

an actual or substantial doubt. It is such a doubt as a reasonable man would seriously entertain. It is a serious doubt for which you could give good reason.

The indictment in this case is a mere accusation or charge against the defendant, and it is not evidence of the defendant's guilt. [p. 122] And the fact that such an indictment had been filed, it is of no weight and does not carry any presumption of guilt, and you must not be influenced by it in considering the case, it has no probative value.

You are prohibited by law in your oath from going beyond the evidence to seek for doubts upon which to acquit the defendant, but must confine yourselves strictly to a dispassionate consideration of the testimony given upon the trial. You must not resort to any extraneous facts or circumstances in reaching your verdict. That is, you must not go beyond the evidence to find facts or circumstances creating doubts, but must restrict yourselves to the evidence that you heard on the trial of this case or on the lack of evidence.

You are the exclusive judges of the facts. You are to find from the evidence which facts have been proved and which facts have not been proved. For this purpose, you determine the credibility of the witnesses, accordingly as you are impressed with their veracity.

You may take into account their demeanor, their manner on the stand, the probability or [p. 123] improbability of their statement, the interest or want of interest they may have in the case, and every circumstance surrounding the giving of their testimony which may aid you in weighing their statements.

If you believe that any witness in the case, either for the State or for the defense, has willfully and deliberately testified falsely to any material fact, then I charge you that you are justified in disregarding the entire testimony of such witness as proving nothing, and as unworthy of belief. You have the right to accept as true or reject as false the testimony of any witness, accordingly as you are impressed with his or her veracity.

You are also the judges of the law, but in a different sense. You receive evidence from the witnesses; you receive the law from the Court, and it is your duty to accept the law and to apply it as given to you.

You must determine the facts only from the evidence presented. The evidence which you should consider consist of the testimony of the witnesses and of such exhibits and writings and physical objects which the Court has permitted [p. 124] the parties to introduce.

You must not consider any evidence which was not admitted or which you were instructed to disregard or to which an objection was sustained.

As jurors you alone shall determine the weight and credibility of the evidence. As the sole judges of the credibility of witnesses and of the weight that testimony deserves, you should scrutinize carefully the testimony given and the circumstances under which the witness has testified. In evaluating the testimony of witness, you may consider his or her ability and opportunity to observe and remember the manner about which he or she testified, his or her manner while testifying, any reason he or she may have for testifying in favor of or against the State

or the defendant, and the extent to which the testimony is supported or contradicted by other evidence.

Statements and arguments made by the attorneys are not evidence.

In the opening statements the attorneys were permitted to familiarize you with the facts they expected to prove. In closing arguments the attorneys were permitted to present for your consideration their [p. 125] contentions regarding what the evidence has shown or not shown, and what conclusions they think may be drawn from the evidence.

The opening statements and closing arguments are not to be considered as evidence.

You are not to be influenced by sympathy, passion, prejudice or public opinion. You are expected to reach a just verdict.

Direct and Circumstantial Evidence.

Evidence is either direct or circumstantial. Direct evidence is evidence which, if believed, proves a fact. Circumstantial or indirect evidence is evidence which, if believed, proves a fact, and from that fact you may logically and reasonably conclude that another fact exists.

You cannot find the defendant guilty solely on circumstantial evidence, unless the facts proved by the evidence excludes every reasonable hypothesis of innocence.

Criminal intent may be specific or general.

Specific criminal intent is that state of mind which exists when the circumtances [sic] indicate that the defendant actively desired the prescribed criminal consequences to follow his act or failure to act.

General criminal intent is present when the [p. 126] circumstances indicate that the defendant must have adverted to the prescribed criminal consequences as reasonably certain to result from his act or failure to act. General criminal intent is always present when there is specific intent.

Whether criminal intent is present must be determined in light of ordinary experience. Intent is a question of fact which may be inferred from the circumstances.

You may infer that the defendant intended the natural and probable consequences of his acts.

If the State offers evidence of a statement by the defendant, you must first determine whether the statement was in fact made. You must also consider whether the statement, if made, was accurately recorded or repeated.

If you find that the defendant made a statement, you must also determine the weight or value that the statement should be accorded, if any. In determining the weight or value to be accorded a statement made by a defendant, you should consider all the circumstances under which the statement was made. In making that determination, you should consider whether the statement was made freely and voluntarily, [p. 127] without the influence of fear, duress, threats, intimidation, inducement or promises.

Evidence of Experts.

Experts are persons who are learned in a particular science, and they are permitted to express their opinion upon scientific matters in issue. You, the jurors, are the ones who in law must bear the responsibility of deciding the case. The experts are merely witnesses, and you have the right to either accept or reject their testimony and opinions in the same manner and for the same reasons for which you may accept or reject the testimony of other witnesses in the case.

When you enter the jury room, it is your duty to consult with one another, to consider each other's views, and to discuss the evidence with the objective of reaching a just verdict, if you can do so without violence to your individual judgment. Each of you must decide the case for yourself, but only after discussion and impartial consideration of the case with your fellow jurors.

You are not advocates for one side of [sic] the other. Do not hesitate to reexamine your own views, to change your opinion if you are [p. 128] convinced you are wrong. But do not surrender your honest belief as to the weight and the effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

The defendant is permitted by law to testify in his own behalf. If he exercises this privilege, he is governed by the same rules in testing his credibility and the correctness of his statements as every other witness. You have the right to believe or disbelieve him, just as he impresses you as to the truth or falsity of his testimony. When he does not avail himself of this privilege, you

should not consider this fact, or permit it to raise a presumption of guilt against him, and you should consider in determining his guilt or innocence only those facts testified to and brought out in the trial of the case.

Rape is the act of anal or vaginal sexual intercourse with a male or female person who is not the spouse of the offender, committed without the person's lawful consent.

Emission is not necessary and any sexual penetration, vaginal or anal, however [p. 129] slight is sufficient to complete the crime.

The defendant is charged with the aggravated rape of Jennifer Morgan.

Aggravated rape is the act of vaginal sexual intercourse with a person who is under twelve years of age and not the spouse of the defendant.

Sexual intercourse is deemed to have taken place even though emission did not occur. Any vaginal sexual penetration, however slight is sufficient.

Lack of knowledge of the age of the person is not a defense.

Thus, in order to convict the defendant of aggravated rape, you must find:

1) That the defendant committed an act of vaginal sexual intercourse with Jennifer Morgan; and

2) That Jennifer Morgan was a person under the age of twelve; and

3) That Jennifer Morgan was not the defendant's spouse.

In order to convict the defendant of the offense charged, you must find beyond a reasonable doubt that the State proved every element of aggravated rape.

If you are not convinced that the defendant is guilty of the offense charged, you may find the defendant not guilty or guilty [p. 130] of a lesser offense, if you are convinced beyond a reasonable doubt that the defendant is guilty of a lesser offense.

The following offense [sic] are responsible lesser offenses:

Guilty of Attemted [sic] Aggravated Rape

Guilty of Forcible Rape

Guilty of Attempted Forcible Rape

Guilty of Sexual Battery

Not Guilty.

Forcible Rape.

Forcible Rape is the act of vaginal sexual intercourse with a person who is not the defendant's spouse and without the person's lawful consent because the person is prevented from resiting [sic] the act by force or threats of physical violence under circumstances where she reasonably believes that resistance would not prevent the rape.

Sexual intercourse is deemed to have taken place even though emission did not occur. Any vaginal sexual penetration, however slight is sufficient.

Thus, in order to convict the defendant of forcible rape, you must find:

1) That the defendant committed an act of vaginal sexual intercourse with Jennifer Morgan without her consent; and [p. 131]

2) That Jennifer Morgan was prevented from resisting by force or threats of physical violence; and

3) That Jennifer Morgan reasonably believed that resistance would not prevent the act of vaginal sexual intercourse; and

4) That Jennifer Morgan was a person who was not the defendant's spouse.

Sexual Battery.

Sexual batter [sic] is the intentional engaging in any of the following acts with another person who is not the spouse of the offender, where the other person has not yet attained fifteen years of age and is at least three years younger than the offender:

1) The touching of the anus or genitals of the victim by the offender using any instrumentality or any part of the body of the offender; or

2) The touching of the anus or genitals of the offender by the victim using any instrumentality or any part of the body of the victim.

Lack of knowledge of the victim's age shall not be a defense. However, where the victim is under seventeen, normal medical treatment or normal sanitary care of an infant shall not be construed as an offense under the provision of this [p. 132] section.

Thus, in order to convict the defendant of sexual battery, you must find:

1) That the defendant engaged in any of the following acts:

   (1) The touching of the anus or genitals of the victim by the offender using any instrumentality or any part of the body of the offender; or

   (2) The touching of the anus or genitals of the offender by the victim using any instrumentality or any part of the body of the victim; and

2) That the victim was under the age of fifteen and was at least three years younger than the defendant.

Attempt.

A person who has a specific intent to commit a crime and who does or omits an act for the purpose of and tending directly toward accomplishing his object is guilty of an attempt to commit the crime intended.

It is immaterial whether under the circumstances the defendant would have actually have [sic] accomplished his purpose.

Mere preparation to commit a crime is not sufficient to constitute an attempt.

Because an attempt is a lesser grade of the intended offense, the defendant may be [p. 133] convicted of an attempt, although it appears at trial that the defendant

actually committed the completed offense which he is charged with attempting to commit.

Thus, in order to convict the defendant of an attempt, you must find:

1) That the defendant had a specific intent to commit the crime; and

2) That the defendant did or omitted an act for the purpose of and tending directly toward the commission of a crime.

When you retire to deliberate, you must elect one of your members to serve as foreman. When you reach a verdict, the foreman must write the verdict on the form provided by the Court, he or she must sign the verdict and deliver the verdict to me in open court.

At least ten members of the jury must concur to reach a verdict in this case.

When you have reached your verdict, simply knock on the door and advise the deputy sheriff, and court will reconvene to receive it.

Court will be at recess until a verdict is reached.

I give to you, ladies and gentleman, a verdict form. On front of the form are the responsive verdicts. On the rear of the form, when you have reached a verdict, the

* * *

No. 98-55

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1997

BURL CAIN, WARDEN,
Petitioner,

versus

ELMO HUMPHREY, III,
Respondent.

On Petition For Writ of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

The Petition correctly identifies the parties.

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STATEMENT

This is a habeas corpus case. The underlying prosecution stemmed from a recovered memory of sexual abuse between six and eight years before the indictment. The Respondent, Elmo Humphrey, was charged with aggravated rape, a capital offense in Louisiana carrying an automatic life sentence. This was alleged to be his first criminal offense.

The Fifth Circuit's Opinion, reproduced at Pet. App. 17, fairly summarizes the relevant events.[1] Respondent's accuser was a troubled young woman with substantial and conceded credibility problems. She testified to physical abuse at the Respondent's hands, although she could not remember when. She could only recall that it all took place while her family lived in Metarie, Louisiana. She also testified that her family moved in early 1981, which would have been well outside the applicable limitations period. That issue was raised at trial and in this habeas proceeding. It is raised in this Court in the Conditional Cross-Petition for Certiorari.

The prosecution began the trial by suggesting to the venire that Respondent had confessed during voluntary interviews with the police. Just the opposite was true, although the actual statements were never introduced. The trial court denied a motion for mistrial.

Aware its case turned on a single credibility assessment of one problematic witness, the State offered the testimony of an "expert" in the so-called child-abuse-accommodation-syndrome. This expert testified, in essence, that the complainant's credibility and memory problems were in fact symptoms of rape. Respondent's objection to this testimony was overruled. Shortly after the

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[1] Oddly, the Petition assails the Fifth Circuit for recounting the facts and suggesting that the question of guilt was uncomfortably close. To the Petitioner, the Respondent's guilt or innocence is irrelevant and should not inform the analysis. Notably, however, the Petition itself succumbs to the temptation to relate only those aspects of the trial that are favorable to the State.

conviction in this case, the Louisiana Supreme Court, joined by virtually every other state court to consider this issue, found this expert testimony so "inherently unreliable" that it should play no role in a criminal trial.

On top of all of this, in defining reasonable doubt for the jury, the trial court employed the same three mis-definitions of that phrase that were condemned as unconstitutional by this Court in *Cage*. In addition, the instruction told the jurors that they should have "a serious doubt for which you could give good reason" if they were to vote not guilty. The jury divided over the question of guilt or innocence. As Louisiana law permits conviction on concurrence of ten jurors, even in capital cases, La. Code Crim. Pro. art. 782, Respondent was sentenced to life imprisonment at hard labor without possibility of parole.

On direct appeal, the Louisiana intermediate court of appeals rejected all of Respondent's claims, including his argument that the jury instruction had violated due process. The Louisiana Supreme Court refused to hear this case. Two months later it rejected identical arguments in *Cage*. Shortly thereafter, this Court granted certiorari in *Cage* and reversed.

Respondent exhausted state habeas without securing relief. This was his first application for federal habeas relief. The district court denied relief. The Fifth Circuit appointed counsel and, sitting en banc, reversed, having found the instruction given at Respondent's trial denied him due process under *Cage* and *Victor*. It ordered that Respondent be released or retried.

SUMMARY OF OPPOSITION

The Fifth Circuit's holding was correct. This Court's *Cage* decision and its more recent decision in *Victor* confirm that an instruction simultaneously mis-defining reasonable doubt as "grave uncertainty," "substantial doubt" and "moral certainty" is unconstitutional. Adding a

requirement that jurors possess "a good reason" for not convicting, as this instruction did, simply underscores that conclusion.

The Fifth Circuit also correctly applied the standards set forth by this Court in *Victor* and *Boyde* for reviewing jury instructions. It did not suffer from any confusion over how this standard should be applied. Contrary to Petitioner's assertions, this is not an area in need of further "guidance" from the Court.

While the Petition urges that the Fifth Circuit's decision in this case has somehow created a split among the circuits, just the opposite is true. Prior to its decision in this case, the Fifth Circuit was alone in denying retroactive application to this Court's *Cage* decision. The en banc decision resolved that conflict. It correctly held that *Cage* is available retroactively because it applied a rule that implicates accuracy and relates to the fundamental fairness of the proceeding. Indeed, it is also likely that *Cage* did not even announce a "new rule" of constitutional law so as to raise the question of its retroactivity.

Lastly, the Petition argues that the Fifth Circuit created a circuit split by its decision on the merits. As explained more fully below, it did not. Rather, it correctly applied three recent decisions of this Court confirming the existence of a due process violation and its consequence. No other circuit has held to the contrary. Indeed, no other has even addressed an instruction such as the one at issue here.

REASONS FOR DENYING THE WRIT

I. THE EN BANC FIFTH CIRCUIT DECISION RESOLVED, BUT DID NOT CREATE, A SPLIT AMONG THE CIRCUITS

In its Petition, Louisiana claims that the panel opinion, Pet. App. 17, as adopted by the *en banc* court, Pet. App. 1, somehow created a circuit conflict. In fact, it resolved an ongoing conflict between the Fifth Circuit and two other circuits.

This Court decided in 1970 that the due process guarantee carried the requirement of proof beyond a reasonable doubt to any state court proceeding in which a citizen's liberty is in jeopardy. *In re Winship*, 397 U.S. 358 (1970). In *Cage v. Louisiana*, 498 U.S. 39 (1990), the Court unanimously held that an instruction, essentially identical to the one given here, mis-defined "reasonable doubt" and thereby reduced the state's burden of proof. In *Sullivan v. Louisiana*, 508 U.S. 275 (1993), the Court held that an error in defining reasonable doubt is a structural error in a trial too basic to be subjected to harmless error review.

In *Victor v. Nebraska*, 511 U.S. 1 (1994) the Court contrasted two instructions, one from California and another from Nebraska, from the one given in *Cage* and in this case and found that several critical distinctions existed. Among other differences, Victor's instruction did not contain the combination of errors that Cage's had. Thus, it did not present the risk "that the jury would interpret the term 'substantial doubt' in parallel with the preceding reference to 'grave uncertainty,' leading to an overstatement of the doubt necessary to acquit." *Id.* at 1250.

In its Petition, the State urges that yet another opinion -- the fourth of this decade -- is necessary to provide further guidance. It argues, in connection with a case in which a conviction leads to an automatic life sentence, that an instruction containing each of the three mis-definitions of reasonable doubt condemned in *Cage* together with a definition requiring jurors to convict

unless they have a "good reason" not to, does not violate the Due Process Clause. It also argues, in its second question presented, that judicial review of the due process violation in this case was barred by the Court's decision in *Teague v. Lane*, 489 U.S. 288 (1989). This Opposition will address those arguments in reverse order below.

A. The En Banc Fifth Circuit Decision Is In Accord With The Two Other Circuits To Address Question Two

The Fifth Circuit panel found itself bound by another panel's opinion[2] to conclude that an error sounding under *Winship*, as applied in *Cage* and its progeny, is subject to the bar of *Teague v. Lane*, 489 U.S. 288 (1989), which precludes retroactive application of "new rules" of constitutional law in habeas proceedings, barring a recognized exception. The Eleventh and Fourth Circuits had previously held to the contrary. *Nutter v. White*, 39 F.3d 1154, 1158 (11th Cir. 1994); *Adams v. Aikens*, 41 F.3d 175, 179 (4th Cir. 1994). Following an even earlier Fifth Circuit decision,[3] these two circuits concluded that this Court's decision in *Cage* did in fact state a "new rule" of constitutional law. However, taking their cue from *Sullivan v. Louisiana*, 508 U.S. 275 (1993), both of these circuits concluded that *Cage* is nonetheless retroactively available under *Teague's* second exception allowing for retroactive application of rules "central to an accurate determination of innocence or guilt." *Teague*, 489 U.S. at 319.

Until the en banc decision in this case came to the same conclusion as the Fourth and Eleventh Circuits, the Fifth Circuit was the only federal circuit in disagreement. The Ninth Circuit recently came to a parallel conclusion with respect to the application of *Sullivan*. *Harmon v. Marshall*, 69 F.3d 963 (9th Cir. 1995); *see also Ramirez v. Hatcher*, 136 F.3d 1209, 1215 (9th

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2 *United States v. Shunk*, 113 F.3d 31, 37 (5th Cir. 1997).

3 *Skelton v. Whitley*, 950 F.2d 1037 (5th Cir. 1992).

Cir. 1998) (Op. of Reinhardt, J.) (urging retroactivity of *Cage*). Thus, every circuit to address this issue has now agreed that an error under *Cage* that allows a conviction on proof below the beyond reasonable doubt standard is available for review in a habeas corpus proceeding brought under 28 U.S.C. § 2254.

B. The "Circuit Split" Urged in Question One is Illusory

In its first question presented, Louisiana claims that the Fifth Circuit created a conflict when it ruled that the combination of the three mis-definitions of reasonable doubt highlighted in *Cage* with yet another violates due process. Notwithstanding this supposed "conflict," the State does not cite a single case from any court, state or federal, addressing these errors. Rather, it cites cases dealing with other instructions.

1. The State concedes that under *Winship* and its progeny, including *Cage* and *Victor*, each charge must be reviewed as a whole

No one questions the proper standard by which an instruction should be reviewed. The instruction, read as a whole, must "correctly convey the core concept of reasonable doubt." *Holland v. United States*, 348 U.S. 121 (1954). The question becomes whether "there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution." *Estelle v. McGuire*, 502 U.S. 62, 72 (1991) (quoting *Boyde v. California*, 494 U.S. 370 (1990)). The Fifth Circuit applied that standard. Pet. App. 25.

2. No case outside of the Fifth Circuit has even confronted a charge simultaneously containing all of the erroneous definitions found to be unconstitutional in *Cage* since *Cage* was decided

Once one accepts the state's own argument as true -- that these decisions turn on a reading of an instruction in its entirety -- its asserted conflict evaporates. No case in any Circuit, before this one, involved all of the mis-definitions found in *Cage* to deny due proceed together

with a definition requiring the jurors to convict unless they had "good reason" for voting not guilty.

Certainly, no conflict can be implied from the cases cited in the Petition. In those cases, the First, Second and District of Columbia Circuits expressed disapproval for the language, highlighted in the Petition as having been repeated here, defining reasonable doubt respectively as a doubt "for which some good reason could be given" or one for "for which you can give a reason." None of those instructions is otherwise similar to this one. As the Fifth Circuit stressed, no court had confronted the "array of reasonable doubt qualifiers" presented in this case. Pet. App. 29.

The Fifth Circuit's opinion in this case simply found that the *Cage* errors combined with the erroneous requirement that jurors be prepared to offer a "good reason" for a not guilty verdict "[left] the instruction beyond constitutional repair." Pet. App. 32. It did not create any conflict with any court outside of the Fifth Circuit. Neither did it attempt to depart from earlier decisions from within the Fifth Circuit, considering similar instructions and holding that the combination of the three *Cage* errors was not itself sufficient to deny due process. Pet. App. 32.[4]

II. THIS COURT'S OPINION IN *VICTOR* HAS ALREADY PROVIDED GUIDANCE AND A STANDARD THAT WAS FOLLOWED BY THE FIFTH CIRCUIT

The Petition's final argument is two-fold. It urges that the Court should review this case to provide guidance to lower courts generally. It also claims that Louisiana is in need of further guidance and, in particular, a reversal in this case.

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[4] While this case involves additional error, the question whether an instruction that contains all of the *Cage* errors, as this one did, appears to be fairly included within Louisiana's question. Rule 14(1)(a).

A. The Lower Courts Require No Further Guidance

The Petition suggests, Pet. 15, that the Court "has not reviewed an instruction alleged to be violative of *Cage* under the modified standard of *Victor v. Nebraska*." *Victor* makes explicitly clear that *Cage* stands as an example of an unconstitutional instruction. *Victor*, 511 U.S. at 16 & 20-21. It should also be clear that *Victor* did not modify the standard by which jury instructions are reviewed. As the Petition later acknowledges, the Court's decision in *Boyde v. California*, 494 U.S. 370 (1990), which pre-dated both *Cage* and *Victor*, clarified the standard of review of jury instructions, requiring consideration of whether it is reasonably likely that the jurors applied the instruction in an unconstitutional standard.

Boyde itself acknowledged that the distinction between "various phrasings" may not have suggested any great difference. *Id.* at 379. Nonetheless, Louisiana urges that further guidance in the application of the *Boyde* standard is needed. While Louisiana suggests that the Court has not the applied the *Boyde* standard, it has.[5] Indeed, the *Victor* opinion itself applied that standard and provided "guidance" that was followed by the Fifth Circuit here. Pet. App. 25.

Moreover, the Petition's understanding of the *Sullivan* decision in connection with this argument is difficult to fathom. It argues that the Court in *Sullivan* found the instruction as a whole not to violate *Cage*. Pet. 15. To the contrary, this Court accepted the admission that the *Sullivan* instruction was virtually identical to the one in *Cage* and thus violated due process. *E.g.*, 508 U.S. at 277 & 282 (Op. of Rehnquist, C.J.). The Louisiana Supreme Court adhered to this Court's mandate, found the instruction unconstitutional on remand and ordered a new trial. *State*

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5 *Buchanan v. Angelone*, 118 S. Ct. 757 (1998); *Simmons v. South Carolina*, 512 U.S. 154 (1994); *Victor*, 511 U.S. at 5; *Estelle v. McGuire*, 502 U.S. 62, 73 (1991).

v. Sullivan, 623 So. 2d 1315 (La. 1993). Sullivan was then retried and convicted. *State v. Sullivan*, 688 So. 2d 1245 (La. Ct. App. 1997).

The related argument, Pet. 18, borrowed from the dissent below, that the Fifth Circuit somehow erred in applying the "reasonable likelihood" standard by attempting to determine how the jurors likely perceived the instructions is even more difficult to understand. The *Boyde* standard demands inquiry into the instruction's likely effect upon the jurors, as would any other standard. Unless the rule is to be changed to permit the taking of affidavits from the jurors themselves,[6] a reviewing court can only gauge the probable reaction of the jurors by examining the language used in the instruction. The Petition and the dissent below offer no alternative. Rather, they implicitly suggest that there should be no review at all.

B. Louisiana Should Follow The Guidance Already Provided By This Court And The Fifth Circuit

Lastly, the Petition urges that the Fifth Circuit's decision will create havoc. It claims that many people with instructions identical to this one are in its prisons and that they have been there so long that it would be difficult for the State to retry them. The Petition does not claim to have surveyed the State's prison population and it is not clear whether it purports to speak for the State or merely the Parish filing the Petition.

If it is in fact true, as the Petition claims, that many people have been tried and convicted in Jefferson Parish or Louisiana using a definition of reasonable doubt that required the jurors to have "a good reason" to vote not guilty and contained three other mis-definitions of reasonable doubt that standing alone were condemned as unconstitutional by Louisiana's Supreme Court in

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[6] *Tanner v. United States*, 483 U.S. 107, 125 (1987); La. Code Evid. 606.

1982[7] and this Court in 1990, the question might be put to the Petitioner. Why, after all of this, and especially six years after this Court announced that an error such as this is so basic that it is as if these people had not had the benefit of a guilty verdict, have none of these people been retried before now?

While the Petition (at 24) cites, 28 U.S.C. § 2254(e)(2)(A)(1), in support of its claim that the Fifth Circuit has created an urgent need for review, it misquotes the statute. The Fifth Circuit's decision in this case will not open the "floodgates" by announcing that *Cage* is a new rule that was previously unavailable. The statute permits future successive filings only if *this Court* takes this or some other case on certiorari and holds (1) that *Cage* was a "new rule" and (2) that it is retroactively available. *E.g.*, *In re Smith*, 142 F.3d 832 (5th Cir. 1998). The first issue is raised in this case by Conditional Cross-Petition.

III. THIS CASE IS NOT AN APPROPRIATE VEHICLE FOR MODIFYING *CAGE* OR *VICTOR*

As the Fifth Circuit's opinion suggests, this was not a typical habeas corpus case. The question of the defendant's guilt was "a close and difficult" one. Pet. App. 33. There were many errors affecting the basic fairness of the proceedings and confidence in the result. If the Court is interested in revisiting any aspect of the decisions in *Cage* and *Victor*, the State suggests in its Petition that there will be many other opportunities for doing so in the future. If the Petition is granted in this case, however, the Court should also grant the Cross Petition so as to preserve its opportunity to achieve a just result.

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[7] *State v. McDaniel*, 410 So. 2d 754, 756 (La. 1982).

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing was served by First Class United States Mail this 7 day of August, 1998 upon counsel of record for Petitioner, pursuant to Rule 29 at the following address:

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_____